SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

No. 75-588

STATE OF WASHINGTON, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, CARL CROUSE, Director, Department of Game, and WASHINGTON STATE GAME COMMISSION,

Petitioners,

v.

UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS on behalf of the QUEETS BAND OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, UPPER SKAGIT RIVER TRIBE, AND QUILEUTE INDIAN TRIBE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SLADE GORTON,
Attorney General

EARL MCGIMPSEY,
Assistant Attorney General

EDWARD B. MACKIE,
Deputy Attorney General
Counsel for Petitioners

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
(206) 753-6207

STATE PRINTING PLANT — OLYMPIA, WASHINGTON

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INDEX

Page

OPINIONS BELOW 2

JURISDICTION 4

TREATY AND STATUTORY PROVISIONS INVOLVED 4

ISSUES PRESENTED 5

STATEMENT OF FACTS..... 6

REASONS IN SUPPORT 9

Summary of Argument 9

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT..... 11

A. The Expansion of Tribal Jurisdiction by the Courts Below Exceeds the Jurisdiction Rules Uniformly Applied by This Court 11

B. The Circuit Court's Limitation on State Police Power Is Inconsistent with Prior Decisions of this Court 16

II. THIS PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 19

A. Quantification of the Treaty Right in Terms of a Percentage of the Harvest of a Natural Resource Presents An Unprecedented Question of Broad Application 19

B. Determination of the 1937 Convention's Effect on Prior Treaties with Indians Presents an Important Federal Question with International Consequences 23

CONCLUSION 28

APPENDIX INDEX 33

TABLE OF AUTHORITIES

TABLE OF CASES

Page

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) 14
Antoine v. Washington, 95 S. Ct. 944 (1975) 18
Chae Chan Ping v. United States, 130 U.S. 581 (1889) 25
Davis v. United States, 409 F. 2d 1095 (5th Cir. 1969) 15
DeCoteau v. District County Court for the Tenth Judicial District, 95 S. Ct. 1082 (1975) 12
Dept. of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II) 9, 10, 16, 17, 20, 21, 30
Ex parte Crawford, 148 Wash. 265, 268 Pac. 871 (1928) aff'd on rehearing 140 Wash. 698 (1929) 15
Ex parte Morgan, 20 Fed. 298 (W.D. Ark. 1883) 15
Ford v. United States, 273 U.S. 593 (1926) 14
Kennedy v. Becker, 241 U.S. 556 (1916) 11, 12, 13, 17
Kirkes v. Ashew, 32 F. Supp. 802 (E.D. Okla. 1940) 15
Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 25
McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 13
McLean v. Mississippi ex rel. Roy, 96 F. 2d 741 (5th Cir. 1938) 15
Menominee Tribe v. United States, 391 U.S. 404 (1968) ... 25
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 13
Missouri v. Holland, 252 U.S. 416 (1920) 25
Pacific States Box and Basket Co. v. White, 296 U.S. 176, (1935) 19
Pigeon River Co. v. Cox Co., 291 U.S. 138 (1934) 25
Puget Sound Purse Seine Vessel Owners v. Moos, Washington State Supreme Court Docket No. 43938 .. 27
Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (Puyallup I) 12, 13, 16, 17, 18
Settler v. Lameer, 507 F. 2d 231 (9th Cir. 1974) 12
Skiriotes v. Florida, 313 U.S. 69 (1941) 14
SoHappy v. Smith, 302 F. Supp. 899 (1969) 18, 22
State of Washington, et al. v. United States of America, et al., 384 F. Supp. 312 (W.D.Wash. 1974) 2
Strassheim v. Daily, 221 U.S. 280 (1910) 14
The Appollon, 22 U.S. (Wheat) 362 (1824) 14, 15

TABLE OF CASES—Continued

Page

Tulee v. Washington, 315 U.S. 681 (1942) 7, 17, 23
United States v. Bowman, 260 U.S. 94 (1922) 14
United States v. Boyd, 491 F. 2d 1163 (9th Cir. 1973) 19
United States v. Winans, 198 U.S. 371 (1905) 17
Ward v. Texas, 316 U.S. 547, 86 L. ed 1663, 62 S. Ct. 1139 (1942) 15
Washington State Commercial Passenger Fishing Assoc. v. Tollefson and Washington Kelpers Assoc. v. Tollefson consolidated under Docket No. 43642, Washington State Supreme Court 22

UNITED STATES STATUTES

16 U.S.C. §§ 776-776f 5, 9, 23
16 U.S.C. § 776a(a) 25
16 U.S.C. § 776d 24
16 U.S.C. § 776d(a) 24
16 U.S.C. § 776d(b) 24
28 U.S.C. § 1254(1) 4
28 U.S.C. §§ 1331, 1343(3)(4), 1345, 1362 2

UNITED STATES STATUES AT LARGE

10 Stat. 1132 (Treaty of Medicine Creek) 4, 31
12 Stat. 927 (Treaty of Point Elliott) 4
12 Stat. 939 (Treaty with the Makah) 4
12 Stat. 952 (Treaty with the Yakimas) 4, 15
12 Stat. 971 (Treaty with the Quinaielt) 4
50 Stat. 1355 (1937 Convention with Canada) 5, 6, 23, 25

WASHINGTON STATE STATUTES

RCW 75.40.060 ..... 5, 24, 27

TEXTS AND OTHER AUTHORITIES

	Page
161 A.L.R. 377	15
6 Ariz. L. Rev. 237 (1965), Kane, Jurisdiction over Indians and Indian Reservations	14
12 C.F.R. 6345	24
25 C.F.R. 11.2 (1973)	14
25 C.F.R. 11.57 (1973)	14
Department of Interior, Federal Indian Law 450 (1958)	14
33 Mont. L. Rev. 277 (1972), Parker, State and Tribal Courts in Montana: The Jurisdictional Relationship	14
18 Op. Atty. Gen. 440	14
Restatement (2d) of the Foreign Relations Law of the United States, § 18 (1965)	15
T.I.A.S. 3867, 8 U.S.T. 1057	5, 23

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The petitioners State of Washington, Thor C. Tollefson, Director, Washington State Department

of Fisheries, Carl Crouse, Director, Department of Game, and Washington State Game Commission respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 4, 1975 (Petition for rehearing denied July 23, 1975). The opinion, which is included in the Appendix, pp. 35-56, has not yet been published in the Federal Reporter.

OPINIONS BELOW

This proceeding was commenced as a declaratory judgment action in the United States District Court for Western Washington in September, 1970, by the United States on behalf of seven Indian tribes. Seven additional tribes were permitted intervention prior to trial, and twelve additional tribes joined in post-trial proceedings. Defendants were the State of Washington and its Departments of Game and Fisheries. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343(3)(4), 1345 and 1362. The action sought a declaration of the tribes' off-reservation treaty fishing rights in an area encompassing Puget Sound and the Olympic Peninsula of Western Washington.

Following trial, the District Court entered a memorandum decision on February 12, 1974. 384 F. Supp. 312 (W.D. Wash. 1974). *See*, Appendix, pp. 59-92. The court held that members of the plaintiff tribes have treaty rights which the court interpreted to require: (1) That certain tribes, meeting condi-

tions and qualifications created by the court, could preempt state regulation and exclusively regulate their own members' off-reservation fishing; (2) that state regulation of the remaining tribes was conditioned on tribal consent or prior court approval; (3) that state fish and game laws could not constitutionally be applied to treaty Indians fishing off reservation;* (4) that a 1937 Convention between the United States and Canada together with implementing legislation, providing for international regulation of the major salmon harvest within the case area, did not modify prior Indian fishing rights; and (5) that the opportunity to harvest fish was to be apportioned on a percentage share basis as follows: Indians have the opportunity to catch for *commercial purposes* 50% of all the harvestable fish which would return to their usual and accustomed fishing areas if there were no other fisheries *PLUS* (a) commercial harvests on reservation; (b) harvests for personal consumption; and (c) harvests for ceremonial purposes. The court further held that Indian harvests outside their usual and accustomed grounds are considered as part of the *non-Indian* rather than the Indian harvest in determining the 50% share. Additionally, the court decreed that Indians are entitled to an extra share, denominated an "equitable adjustment," of fish over and above their 50% entitlement to compensate them for fish taken in areas outside the jurisdiction of the State of Washington but contiguous thereto.

*These statutes are set forth in the Appendix pp. 101-105.

A panel of the United States Court of Appeals for the Ninth Circuit on June 4, 1975, entered an opinion substantially affirming the District Court and on July 23, 1975, denied a petition for rehearing.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. Those six treaties contain a provision of which the following is typical:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, * * * on open and unclaimed lands. Provided however, that they shall not take shellfish from any beds staked or cultivated by citizens.

The six treaties are: Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty with the Makah (Treaty of Neah Bay) January 31, 1855, 12 Stat. 939; Treaty with the Quinaielt (Treaty of Olympia) July 1, 1855, 12 Stat. 971; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951.

This litigation also involves a 1937 Convention with Canada (50 Stat. 1355), a 1957 Protocol amending the same (T.I.A.S. 3867, 8 U.S.T. 1057), federal statutes implementing it (16 U.S.C. §§ 776-776f), and a Washington implementing statute (RCW 75.40.060). Pertinent provisions of the foregoing are set forth in the Appendix.

ISSUES PRESENTED

1. Must the state in exercising its jurisdiction over off-reservation Indian fishing, before restricting that fishery, prohibit all non-Indian fishing and obtain the approval of the court or the Indian tribe affected by the regulation?

2. Do Indian tribes have extraterritorial jurisdiction to prescribe and enforce off-reservation fishing regulations and, if such jurisdiction exists, can its exercise restrict the power of the state to regulate?

3. Can a federal District Court, without the benefit of express legislation, grant exclusive off-reservation jurisdiction to Indian tribes selected by it and thereby preempt the exercise of state jurisdiction?

4. Do the treaties entitle Indians to 50% of all the harvestable fish in Western Washington and an additional adjustment for fish caught in adjacent waters outside the state's jurisdiction?

   a. Do the Stevens' treaties mandate a 50% share for Indian fishermen?

   b. Did the Court of Appeals err in deferring

to the discretion of the District Court when no discretion was exercised by it in establishing the 50% share?

c. Should the total net harvest of Indian fishermen, whether on the reservation, in usual and accustomed grounds off-reservation or in the general all-citizen fishery be included in determining the Indians' share of the harvest?

d. Is there any basis in law for the court to require an additional adjustment for Indians in excess of its decreed 50% share to reflect fish caught in International Pacific Salmon Fisheries Commission waters and waters outside the State of Washington?

5. Does the 1937 Convention between the United States and Canada (50 Stat. 1355) and implementing federal legislation take precedence over the treaties executed in 1854 and 1855 with Washington Indians?

STATEMENT OF FACTS

The treaties executed in 1854 and 1855 were in anticipation of an influx of settlers into Western Washington. The Indian settlements were widely dispersed and fish was a major food source with the Indian fishery being primarily for subsistence. The treaties contemplated the creation of reservations and reserved to the Indians the opportunity to con-

tinue to gather fish at their usual and accustomed places.

Until the invention and perfection of the canning process late in the 19th Century, commercial fishing enterprises were rudimentary and largely unsuccessful. The advent of the canning process gave rise to large scale commercial fisheries which have been and now are open to all citizens, both Indian and non-Indian. Today the Indian fishery is primarily commercial. In addition to river net fisheries, significant numbers of Indian commercial fishermen fish in regular commercial fishing seasons outside their usual and accustomed areas, as well as special Indian seasons within their treaty areas. They use the same gear and have the same economic incentive as non-Indian fishermen. They are not charged license fees and do not pay landing taxes[1]. The fishery resource is fragile. The boom in commercial fishing at the turn of the century brought the concomitant need for state regulation to conserve the species and provide for an orderly fishery.

This proceeding is concerned with the fishery for anadromous fish which are spawned in fresh water, migrate to the ocean, and return to their river of origin to reproduce the next generation[2]. These anadromous fish consist of steelhead and five species of salmon: chinook, coho, chum, pink and sockeye. These fish are produced naturally in 15 major river

[1]*See, Tulee v. Washington*, 315 U.S. 681 (1942).

[2]The District Court now has expanded the scope of this litigation to include nonanadromous fish; i.e., herring.

systems and their tributaries in the case area and 239 small, independent streams. In addition, the state augments natural runs with hatchery produced fish, and in some rivers and streams the state has created entirely artificial runs of fish.

The runs of each species of salmon to the different rivers and streams are mixed in marine areas. This mixing of runs; e.g., Green River Chinook with White River Chinook, is complicated by the mixing of runs of different species; e.g., Green River Chinook and Coho and White River Chinook and Coho. As the mixed runs proceed along the Pacific Coast or through the Straits of Juan de Fuca and into Puget Sound, each run breaks off and enters its natal stream. Different rivers and streams have differing capacities to support natural and artificial stocks of fish, thereby complicating the intricacies of mixed stocks with the factor of different run sizes for different natal areas, which in turn is complicated by the fact that run sizes for individual streams fluctuate from year to year. The species, the run size, the yearly run size fluctuation all must be reflected in harvest regulations in order that adequate spawning escapement for each run can be achieved.

In order to have a rational harvest of such a complex fishery, the State of Washington and the International Pacific Salmon Fisheries Commission (hereinafter referred to as the Commission) have developed sophisticated management systems of analysis, prediction, daily monitoring, artificial supple-

mentation, and regulation to insure protection of the resource and a maximum sustained yield.

State regulation is shared between the Department of Game, which regulates steelhead[3], and the Department of Fisheries, which regulates salmon. The Commission acts pursuant to a Convention between the United States and Canada, executed in 1937, to regulate harvests of Fraser River salmon in waters of the State of Washington and the Province of British Columbia. Pursuant to authorization from Congress, the state enforces the Commission's regulations. *See generally*, 16 U.S.C. §§ 776-776f. The harvest of Fraser River fish accounts for more than 50% of all fish harvested in the case area.

Fishing is a major commercial enterprise and recreational activity in the State of Washington. In the case area alone there are 283,650 salmon sport fishermen, 145,000 licensed steelhead sport fishermen, 6,600 licensed non-Indian commercial fishermen and 794 Indian commercial fishermen.

REASONS IN SUPPORT

Summary of Argument

The Circuit Court has sanctioned the judicial creation of a jurisdictional entity denominated a "self-regulating tribe" which can without benefit of

[3]Steelhead is a game fish in the State of Washington and is subject only to a hook and line fishery in fresh water except for a commercial fishery by Indians (*Puyallup II*, 414 U.S. 44 (1973)). With only a hook and line fishery, there has not been the need for the type of sophisticated management systems required for salmon, but rather the efforts have been devoted to the augmentation and general management of the steelhead runs. Furthermore, the steelhead population is substantially smaller than that of salmon, the respective harvests in 1971 being 264,599 to 7,777,093.

express federal legislation preempt a state from exercising jurisdiction over its tribal members' activities off reservation. The impact of this jurisdictional mutation is national and has a direct bearing upon all of the Western states encompassed by the Ninth Circuit, wherein a substantial number of treaty Indians reside. The Circuit Court's conditioning the exercise of state police power on tribal action and its redefinition of "conservation" in a manner inconsistent with prior decisions of this Court has crippled the states' ability to fulfill their long-established responsibilities for conservation of natural resources. The Circuit Court has decreed an allocation of the resource not in terms of a limited geographical location such as contemplated by this court in *Dept. of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (Puyallup II), but rather in terms of the entire migratory pattern of the resource. The Circuit Court has impaired the operations of the International Pacific Salmon Fisheries Commission, and refused to grant effective relief when the District Court has ordered the State of Washington to perform certain acts in violation of the Convention with Canada.

Petitioner submits that the importance of these issues, the Circuit Court's complete disregard of applicable decisions of this Court, the lack of precedent for many of the Circuit Court's holdings, and the impact both regionally and nationally require a resolution of these issues by this Court.

I.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. The Expansion of Tribal Jurisdiction By the Courts Below Exceeds the Jurisdiction Rules Uniformly Applied By This Court.

The Court of Appeals affirmed the District Court's grant of extraterritorial jurisdiction to Indian tribes to prescribe and enforce (arrest by tribal officers off reservation) fishing regulations off reservation. This holding is in direct conflict with the holding in *Kennedy v. Becker*, 241 U.S. 556 (1916), recent pronouncements by this Court on the nature of tribal self government and general jurisdictional principles.

In *Kennedy* the Seneca Indians claimed that the tribe had the authority to regulate tribal members at off-reservation usual and accustomed fishing grounds. This court responded at pp. 562-563:

> The *contention of the plaintiffs* in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc*. As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the *dual sovereignty* of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." *We are unable to take this view.* It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise au-

> thority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. *Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.* [Emphasis supplied.]

This Court held the treaty did not reserve any tribal sovereignty in off-reservation areas. This holding was reaffirmed in *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 399-400 (1968). Cf., *De Coteau v. District County Court for the Tenth Judicial District*, 95 S. Ct. 1082, 1084 (1975).

The Court of Appeals attempted to distinguish *Kennedy* by holding that there is no "dual sovereignty" but merely "concurrent jurisdiction." This is a distinction without a difference. Concurrent jurisdiction requires that both jurisdictional entities have sovereignty over the locus in quo; i.e., there is *a priori* dual sovereignty. The only authority relied on by the Court of Appeals was their prior panel decision in *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974). *Settler* held that an Indian tribe could prescribe and enforce (arrest occurred on reservation) off-reservation fishing regulations. The opinion was rendered without any anaylsis of jurisdiction rules and without citation of authority, the court simply opining that it must have been the Indians' understanding at treaty time that they would continue to exercise conrol over off-reservation fishing. *Id.* at 236-237. No reference was made to the record to support this subjective hypothesis, and the record in the instant

case clearly establishes that none of the parties to the treaties contemplated the future need for regulation of fishing which did not occur until development of commercial fishing in the late nineteenth century.

The concept of extraterritorial jurisdiction is totally foreign to the recent decisions of this court. In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) the court rejected arguments of inherent tribal sovereignty and said that limitations of state power result instead from federal pre-emption. This Court barred a state tax for *on*-reservation activity and expressly emphasized that it was not a case where the state sought to reach activity undertaken by reservation Indians on non-reservation lands. 411 U.S. at 168. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) this Court upheld a state tax on *off*-reservation activity. The court stated: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state laws otherwise applicable to all citizens of the state." *Id.* at 148-149. This Court expressly relied on *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) (Puyallup I) to support that proposition. *Puyallup I* had relied on *Kennedy* for the proposition that Indian tribes had not reserved off-reservation jurisdiction.

The federal policy not to preempt state regulation in favor of tribal regulation or to grant tribes concurrent jurisdiction to prescribe or enforce tribal fishing regulations off-reservation is reflected in the

regulations establishing the Court of Indian Offenses which limit the jurisdiction of the Indian courts to enumerated offenses, including game violations (25 C.F.R. § 11.57 (1973)), "committed by an Indian, *within* the reservation or reservations for which the court is established." 25 C.F.R. § 11.2 (1973). [Emphasis supplied.] Similarly the constitutions of the plaintiff tribes limit their jurisdiction to their reservations.

The rule that jurisdiction of an Indian tribe ceases at the border of its reservation is supported in the opinions of the United States Attorney General, the Interior Department Solicitor and in the literature. Department of Interior, Federal Indian Law 450 (1958); 18 Op. Atty. Gen. 440 (1886); Sol. Op. M 36316; Kane, Jurisdiction Over Indians and Indian Reservations, 6 Ariz. L. Rev. 237, 248 (1965); Parker, State and Tribal Courts in Montana: The Jurisdictional Relationship, 33 Mont. L. Rev. 277, 279 (1972).

The general jurisdictional rule is that the authority of any nation or sovereignty is confined within the bounds of its own territory with certain exceptions based on protection of internal interests or nationality. *See Skiriotes v. Florida*, 313 U.S. 69 (1941); *Ford v. United States*, 273 U.S. 593 (1926); *United States v. Bowman*, 260 U.S. 94 (1922); *Strassheim v. Daily*, 221 U.S. 280 (1910); *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909; *The Appollon*, 22 U.S. (9 Wheat) 362 (1824).

See also, Restatement (2d) of the Foreign Relations Law of the United States, § 18 (1965). But even in those instances where a state exercises jurisdiction in a foreign state under either the protective or nationality principle, it does not have the jurisdiction to arrest the offender in the foreign state but must wait until he is found or brought (via extradition)[4] within its own territorial limits. The power to arrest is confined to the territory of the authority making the arrest except in cases of hot pursuit. *Ward v. Texas*, 316 U.S. 547, 86 L. Ed. 1663, 62 S. Ct. 1139 (1942); *The Appollon, supra*; *Davis v. United States*, 409 F.2d 1095 (5th Cir. 1969); *McLean v. Mississippi ex rel. Roy*, 96 F.2d 741 (5th Cir. 1938); *Kirkes v. Ashew*, 32 F. Supp. 802 (E.D. Okla. 1940); *Ex parte Crawford*, 148 Wash. 265, 268 Pac. 871 (1928) aff'd on rehearing 140 Wash. 698 (1929); Annotation, 161 A.L.R. 377 (1929), and cases cited in the A.L.R. Blue Books of Supplemental Decisions.

The holding of the Court of Appeals that Indian tribes have extraterritorial jurisdiction to prescribe laws and make arrests outside their reservations is without precedent and in direct conflict with the applicable decisions of this court. The jurisdictional implications of such a decision range far beyond the fishing rights controversy. For example, the Treaty with the Yakimas, 12 Stat. 951, 953, contains a provision guaranteeing the Indians "* * * the

[4]An Indian tribe cannot have its members extradited from another jurisdiction, e.g., a state. *Ex parte Morgan*, 20 Fed. 298 (W.D. Ark. 1883).

right, in common with citizens of the United States, to travel upon all public highways." Under analogous jurisdictional principles the Yakima Tribe, which the District Court determined to be "self-regulating," could license its members and their motor vehicles and thereby preclude the state from licensing or regulating Yakima Indians driving on highways in the state, even outside the Yakima Reservation. The potentially broad scope of this issue together with the Circuit Court's disregard of binding precedent and traditional jurisdictional concepts calls for review by this Court.

B. The Circuit Court's Limitation on State Police Power is Inconsistent with Prior Decisions of this Court.

The Court of Appeals affirmed the District Court holding that state jurisdiction in off-reservation areas can be restricted by the exercise of tribal regulation or in the case of "self-regulating tribes" completely preempted. This holding flies in the face of consistent holdings by this Court that the state has the "overriding police power" to regulate Indian off-reservation fishing provided its regulations were reasonable and necessary for conservation and nondiscriminatory. *Department of Game v. Puyallup Tribe*,[5] 414 U.S. 44 (1973) (Puyallup II); *Puyallup Tribe v. Department of Game*,[6] 391 U.S. 392 (1968)

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[5] " * * * 'the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the State in the interest of conservation, provided regulation * * * does not discriminate against the Indians' " quoting *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398; 414 U.S. at 48.

[6] " * * * Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens

(Puyallup I); *Tulee v. Washington*,[7] 315 U.S. 681 (1942); *Kennedy v. Becker*,[8] 241 U.S. 556 (1916); *United States v. Winans*,[9] 198 U.S. 371 (1905).

In *Puyallup I* this Court expressly rejected the Ninth Circuit's shackling of state regulation of off-reservation fishing by permitting it only when "indispensable" for conservation. This Court held that the test was whether regulations were reasonable and necessary for conservation. 391 U.S. at 401, n 14. In *Puyallup II* this Court stated that the object was "to accommodate the rights of Indians under the Treaty and the rights of other people." 414 U.S. at 49.

Despite such pronouncements by this Court, the Circuit Court incongruously held at pp. 43, 44 in the Appendix:

> Direct regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a

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of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. * * *" 391 U.S. at 393.

[7] "* * * while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." 315 U.S. at 682.

[8] "* * * Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised." 241 U.S. at 564.

[9] "* * * Nor does it [the Indian treaty provision permitting the taking of fish at usual and accustomed places] restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." 198 U.S. at 384.

> run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction. *Antoine v. Washington*, 95 S. Ct. 944, 952 (1975) [Footnote omitted.]

The Circuit Court's reliance on *Antoine* was wholly inappropriate. In *Antoine*, this Court expressly reaffirmed the "necessary for conservation standard" of *Puyallup I*, rejected a narrower definition urged by the United States i.e., a "compelling need" test, and stated that the question of the regulation's necessity for conservation was not an issue in the case. Id. at 952.

The Circuit Court has reimposed its "indispensable" test in different language, making it impossible for the state to follow the direction of this Court to accommodate the rights of Indian people with the rights of other citizens. The Circuit Court "test" has rendered meaningless this Court's consistent holdings that the state has the "overriding police power" to regulate in nondiscriminatory ways the time and manner of Indian off-reservation fishing.

The requirement that state regulation is subject to consent of the tribes, or alternatively the court, before it is enforceable is completely inconsistent to this Court's statement in *Puyallup I* that state police power to regulate fishing was overriding and the holding of the District Court in Oregon that tribal consent was not required for the state to enforce restrictions on the exercise of treaty rights. *SoHappy v. Smith*, 302 F. Supp. 899, 912 (1969). The holding

below completely circumvents the state's Administrative Procedures Act, and creates a presumption of invalidity contrary to the well-established presumption that administrative regulations, enacted pursuant to properly delegated authority, are valid. *Pacific States Box and Basket Co. v. White*, 296 U.S. 176, 185-186 (1935); *United States v. Boyd*, 491 F. 2d 1163, 1167 (9th Cir. 1973).

This departure of the court below from the well-established guidelines of this Court necessitates review of its decision.

II.

THIS PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Quantification of the Treaty Rights in Terms of a Percentage of the Harvest of a Natural Resource Presents An Unprecedented Question of Broad Application.

This Court has previously considered Indian fishing treaties but has never quantified Indian fishing rights in terms of a percentage of the harvest, as have the District and Circuit Courts in this case. This quantification has had a far greater impact on Indian and non-Indian fishing and on the state management of the fishery resource than any other event in the evolution of the law of Indian fishing rights.

The District Court, with complete disregard for the guidelines suggested by this Court in *Puyallup*

II,[10] ruled as a *matter of law* that the treaty language "in common with" required that Indians have an opportunity to catch for commercial purposes 50% of the harvestable fish, *PLUS* (1) commercial harvests on reservation; (2) harvests for personal consumption; and (3) harvests for ceremonial purposes. The court further held that Indian harvests outside their usual and accustomed grounds are considered as part of the *non-Indian* harvest rather than the Indian share. In addition the court decreed that Indians are entitled to an additional share, denominated as an "equitable adjustment," of fish over and above their 50% entitlement to compensate them for fish taken in areas outside the jurisdiction of the State of Washington. Although the District Court relied exclusively on a dictionary definition[11] and ruled as a *matter of law*, the Court of Appeals affirmed on the basis that the District Court had not abused its *discretion* in decreeing a 50% share. The Circuit Court did modify the "equitable adjustment" so that it would not include harvests by foreign nationals in ocean waters outside state jurisdiction.

The Indian share, which is substantially more than 50%, is grossly disproportional to the relative

[10]In *Puyallup II* at pp. 48-49, this Court stated:

What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

[11]See District Court opinion, p. 84 of the Appendix.

numbers of Indian and non-Indian fishermen, the make-up of the stocks of fish and the purposes for which the treaty fishing clause was negotiated. In the case area there are 283,650 salmon sport fishermen, 145,000 licensed steelhead sport fishermen, 6,600 non-Indian commercial fishermen, and 794 Indian commercial fishermen. The Indian population accounts for only 0.28% of the people living there, most of whom have been completely acculturated. Only 0.07% of the population are Indians living on reservations. Artificial stocks of fish propagated, in the case of salmon with general state revenues and in the case of steelhead with license fee revenues from sport fishermen, contribute signficantly to the harvest of Indians and non-Indians but neither the District Court nor the Court of Appeals considered this as a factor in making an apportionment.[12] The decision below guaranteed Indians an opportunity to harvest *commercially* more than 50% of the total fish harvest for all purposes, but at the time of the treaties commercial fisheries were rudimentary, unsuccessful operations. The treaty records indicate the concern of the Indians was for subsistence fisheries.

To achieve this 50% apportionment the court has ordered drastic reductions in commercial and sport fishing by non-Indians. Some commercial fish-

[12]The District Court withheld ruling on the natural-artificial stock distinction, but in practice under its exercise of continuing jurisdiction has included in its sharing formula both natural and artificial fish. *See* concurring opinion of Justice White joined in by Chief Justice Burger and Justice Steward in *Puyallup II*, 414 U.S. 44, 49 (1973).

ermen have been financially destroyed and the non-Indian fishing industry as a whole seriously depressed by the court's decision. The recreational fishery has been curtailed. Public reaction has been vocal and bitter. Lawsuits have been brought against the state in state court and injunctions granted enjoining state fisheries' officials from implementing reductions ordered by the federal court in non-Indian fishing seasons.[13] More than 450 damage claims have been filed by non-Indian commercial fishermen against the state alleging more than seven million dollars in damage resulting from state enforcement of the federal decree. The decision is also having a substantial impact in the state of Oregon and on Washington fisheries on the Columbia River because Judge Boldt's 50% formula was adopted in *SoHappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969) amended in an unpublished opinion dated May 10, 1974, presently on appeal to the Ninth Circuit Court of Appeals. The fishing industry, which includes commercial fishermen, sports fishermen, suppliers and tourist related interests in Washington and Oregon has been drastically affected and the court decision is having such a broad impact socially, politically and economically that it requires resolution by the highest court of the land.

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[13]*Washington State Commercial Passenger Fishing Assoc. v. Tollefson* and *Washington Kelpers Assoc. v. Tollefson*, Washington Supreme Court, consolidated under Docket No. 43642.

B. **Determination of the 1937 Convention's Effect on Prior Treaties With Indians Presents An Important Federal Question With International Consequences.**

In 1937 the United States and Canada entered into a Convention establishing the International Pacific Salmon Fisheries Commission and conferring on the Commission regulatory authority over the harvest of the Fraser River salmon runs both within American and Canadian waters. 50 Stat. 1355 as supplemented by T.I.A.S. 3867, 8 U.S.T. 1058. It is petitioners' contention that the Convention and implementing federal legislation[14] have modified the Indian treaties so that the state may enforce Commission regulations notwithstanding the fishing clause in the treaties with the Indians.

The Fraser River salmon run over which the Commission has jurisdiction returns from the Pacific Ocean via waterways which form the boundary between Washington and the Canadian province of British Columbia. This fish run represents a total harvest of approximately 7,000,000 fish and accounts for more than 50% of the commercial salmon harvest in the case area. The Commission waters are open equally to fishing by Indians and non-Indians.[15]

The Commission has no arrest or enforcement jurisdiction, which is the responsibility of the respective nations. The federal enforcement agency, de-

[14]The Sockeye and Pink Salmon Fishing Act of 1947 codified in 16 U.S.C. §§ 776-776f.

[15]Indians fishing at usual and accustomed grounds are not required to obtain a state license or pay the landing fees. *Tulee v. Washington*, 315 U.S. 681 (1942).

signated pursuant to statute (16 U.S.C. § 776d(a)), is the National Marine Fishery Service of the Department of Commerce. 12 C.F.R. 6345. The Congressional enactment empowers the federal enforcement agency to authorize officers of the State of Washington to enforce provisions of the Convention, the act and regulations of the Commission. 16 U.S.C. § 776d(b). The legislature of the State of Washington has specifically authorized the director of Fisheries to adopt and enforce provisions of the Convention and the regulations of the Commission. RCW 75.40.060. The enforcement of the Commission regulations in American waters is performed by the Washington State Department of Fisheries.

Although the Court of Appeals was requested to do so, it did not directly rule on the question of the effect of the Convention and implementing legislation on the prior treaties with the Indians. The Court concluded that although the Convention waters subject to regulation by the International Commission are beyond the jurisdiction of the State of Washington, nevertheless Indians are entitled to additional adjustments in their share of the harvest within the state's jurisdiction to reflect harvests in Convention waters.

The state's contention is that acting pursuant to 16 U.S.C. § 776d, it can enforce Commission regulations without the necessity of showing that such regulations are necessary for conservation and to the extent that the Indians' harvest is restricted through

compliance with the Commission regulations, the state has no obligation to compensate Indians by allowing them a greater harvest in areas under exclusive state jurisdiction.

The basis of the state's position is that Congress has the plenary authority to amend or abrogate Indian treaty rights by subsequent legislation. *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67 (1903). *Cf. Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889). While this court will not imply abrogation of such treaty rights by subsequent legislation that can be fairly construed to allow their continued exercise,[16] such exercise must conform to the requirements of the subsequent legislation. *Cf. Missouri v. Holland*, 252 U.S. 416 (1920). The Sockeye and Pink Salmon Fishing Act of 1947, as amended, however, makes it unlawful for "*any person* to engage in fishing for sockeye salmon or pink salmon in convention waters in violation of the convention or of this chapter or of any regulation of the Commission." 16 U.S.C. § 776a(a) (Emphasis supplied) The Convention, Article IX, expressly requires that Commission regulations be enforced against "[e]very national or inhabitant, vessel or boat * * * that engages in fishing * * *" The Act and Convention make no exception for treaty Indian fishing and, unlike the *Menominee* case, there

[16] *Menominee Tribe v. United States, supra*; *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934).

is no other legislation that can be read *in pari materia* with the Act from which an exception from the Commission's regulations for Indian treaty fishing can be construed.

Since Congress has directed that Commission regulations be binding, without exception, on any person fishing in United States waters and state promulgation and enforcement of Commission regulations is in accordance with the Convention, such state regulations may be enforced against Indians without the requirement that they be necessary for conservation or providing compensating harvests in areas of exclusive state jurisdiction. To the extent that this state enforcement conflicts with rights guaranteed under the Stevens' Treaties, the Sockeye and Pink Salmon Fishing Act of 1947 takes precedence over the treaties.

The Circuit Court's opinion glosses over this issue, simply acknowledging that "Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulations," (Appendix at p. 50) and then decreeing the state must permit Indians additional catches in areas under state jurisdiction to compensate them for compliance with Commission regulations.

As previously indicated, the harvest in Commission waters consists of more than 50% of the total commercial harvest in the case area. Adjustments of any magnitude as condoned by the Court of Appeals can result in precluding a non-Indian fishery in

other parts of the case area. Thus, in applying the Circuit Court's holding, the District Court has entered a series of orders compelling the Washington Director of Fisheries to act contrary to the regulations adopted by the Commission:

(1) Enjoining the director from allowing any non-Indian fishing in the Convention waters until the director allowed a special Indian fishery in those waters even though such a special fishery was not permitted by regulations of the Commission. (The Court granted a series of stays of its own order.)

(2) The Court ordered the director of Fisheries to establish by regulation two special fisheries for treaty Indians in Convention waters, which exceeded permissible fishing activities by Commission regulations.

(3) The Court ordered the director to allow Indians to fish with any type of gear whenever the Commission regulations permitted fishing by limited types of gear.

As a result of these orders, a suit was filed in state court against the director of the Department of Fisheries where it was ruled that the director lacked authority under state law[17] to adopt a regulation not in accord with the Commission's regulations. The suit[18] is presently on appeal in the state

[17]The Washington Legislature has authorized the state Department of Fisheries to adopt and enforce Commission regulations. RCW 75.40.060. *See* Appendix at p. 101. The state court held that the Department cannot adopt regulations different from those of the Commission.

[18]*Puget Sound Purse Seine Vessel Owners v. Moos*, Washington Supreme Court, Docket No. 43938.

Supreme Court. The director responded by suspending all of the state regulations affecting salmon commission waters and left the jurisdiction in the area to the federal authorities.

(4) The federal Court responded by ordering the director of Fisheries to repromulgate the regulations.

With this irreconcilable conflict between the rulings of the state court and the federal District Court, interim relief was sought from the state Supreme Court and the Ninth Circuit Court of Appeals and denied by both.

This conflict between the separate judicial systems can only be resolved by this court. It has been brought on by the refusal of the Circuit Court in its opinion below to have directly confronted the issue of the Convention's effect upon the prior treaties with the Indians. This issue needs resolution by this Court not only because the Circuit Court erred on an important federal question which has not been resolved by this Court, but also because of the impossible position in which the State of Washington and the International Pacific Salmon Fisheries Commission have been placed by the District Court's interpretation of the Circuit Court opinion.

CONCLUSION

The District Court has created, and a panel of the Circuit Court affirmed, a complex matrix of unprecedented legal relationships pertaining to treaty

Indian fishing rights based on the simple treaty clause that:

> the right of taking fish, at usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory * * *

The jurisdictional and allocation concepts embodied in this decision create a precedent which severely limits the ability of states to manage and conserve fish and wildlife resources when there are treaty tribes in their area. The allocation of over 50% of the harvestable resource to an Indian commercial fishery is not warranted by the treaties and is grossly out of proportion to any reasonable attempt to accommodate the rights of all citizens when one considers there are 283,650 salmon sports fishermen, 145,000 licensed steelhead sports fishermen, and 6,600 licensed non-Indian commercial fishermen, compared to only 794 Indian commercial fishermen.

The District Court was extremely critical of the consistent line of decisions of this Court which have upheld the state's authority to regulate off-reservation Indian fishing. (Appendix, pp. 71-77) That court paid only lip service to the concept of being bound by those decisions and in a fact emasculated those decisions by denying totally the state's ability to regulate when tribes meet criteria established neither by treaty nor statute but simply by the court. Furthermore, those tribes which do not fully meet the court's criteria are permitted, by unilateral

action, to curtail the state's ability to manage the resource. This totally unprecedented expansion of Indian jurisdiction is not based upon treaty or statutory authority and is beyond the exercise of any discretion which the Circuit Court deferred.

Only this Court can rectify the manifest errors created by the judicial decrees of the lower courts. We respectfully submit that in light of the issues presented, the rulings which are contrary to decisions of this Court, the substantial impact upon recreational and commercial fisheries in Washington and Oregon, the unprecedented concepts which substantially restrict the ability of all states having Indian populations to effectively manage and conserve wildlife resources, and the impact upon the International Convention with Canada, this proceeding stands with those cases in which the writ of certiorari should be granted.

While previously construing one of these treaties (Treaty of Medicine Creek, 10 Stat. 1132) this Court stated in *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 49 (1973):

> The aim is to accommodate the rights of Indians under the treaties and the rights of other people.

We submit that in the present proceeding the courts below have ignored this Court's directive and completely debased the consistent authority of this Court in an effort to absolve feelings of collective guilt for actions taken by our ancestors against the ancestors of the current Indian population. We therefore

respectfully request the application for a writ of certiorari be granted.

DATED this 17th day of October, 1975.

Respectfully submitted,

SLADE GORTON
Attorney General
EARL MCGIMPSEY
Assistant Attorney General
EDWARD B. MACKIE
Deputy Attorney General
Counsel for Petitioners

The Washington Reef Netters Association, a defendant-intervenor in the proceedings below, joins as a petitioner for a writ of certiorari and incorporates and adopts the petition submitted on behalf of the State of Washington, Thor C. Tollefson, Director, Washington State Department of Fisheries, Carl Crouse, Director, Department of Game, and Washington State Game Commission.

DAVID E. RHEA
Asmundson, Rhea & Atwood
805 Dupont Street
Bellingham, Washington 98225
Attorneys for Washington
Reef Net Owners Association

APPENDIX INDEX

	Page
Court of Appeals Decision	35
Court of Appeals Denial of Rehearing	57
District Court Opinion	59
Treaty of Medicine Creek	93
Treaty of Point Elliott	93
Treaty with the Makah	93
Treaty with the Quinaielts	94
Treaty with the Yakimas	94
1937 Convention Between United States and Canada	95
Federal Statutes	99
State Statutes	101

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, vs. STATE OF WASHINGTON, *Defendant-Appellant*, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants*, NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS, *Intervenor-Defendant-Appellant*.	No. 74-2414 OPINION
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, vs. STATE OF WASHINGTON, *Defendant*, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants*, WASHINGTON REEF NET OWNERS ASSOCIATION, *Intervenor-Defendant-Appellant*.	No. 74-2437
UNITED STATES OF AMERICA, *Plaintiff*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, on its own behalf and on behalf of the QUEETS BAND OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, UPPER SKAGIT RIVER TRIBE, AND QUILEUTE INDIAN TRIBE, *Plaintiffs-Appellants*, vs. STATE OF WASHINGTON, *Defendant-Appellee*, THOR C. TOLLEFSON, etc. et al., *Intervenors-Defendants*.	No. 74-2438

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs,* vs. STATE OF WASHINGTON, *Defendant-Appellant,* THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants,* CARL CROUSE, Director of the Department of Game, the WASHINGTON STATE GAME COMMISSION, *Intervenors-Defendants-Appellants.*	No. 74-2439
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs,* vs. STATE OF WASHINGTON, *Defendant-Appellant,* THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants,* THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, *Intervenor-Defendant-Appellant.*	No. 74-2440
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs,* vs. STATE OF WASHINGTON, *Defendant,* THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants,* WASHINGTON REEF NET OWNERS ASSOCIATION, *Defendant-Appellant.*	No. 74-2567
UNITED STATES OF AMERICA, *Plaintiff,* QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs,* PUYALLUP TRIBE OF PUYALLUP RESERVATION, *Plaintiff-Appellant,* vs. STATE OF WASHINGTON, *Defendant-Appellee,* THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants.*	No. 74-2602

UNITED STATES OF AMERICA, *Plaintiff*,
QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs*,
NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, *Plaintiff-Appellant*,
vs.
STATE OF WASHINGTON, *Defendant-Appellee*,
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants*.

No. 74-2705

[June 4, 1975]

On Appeal from the United States District Court
for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges,
and BURNS,* District Judge.

CHOY, Circuit Judge:

The United States brought this suit to enforce compliance by the State of Washington and its Departments of Game and Fisheries with certain treaties between the federal government and various Indian tribes of western Washington (treaty Indians; treaty tribes). The Government initially represented the interests of seven named tribes. Other tribes intervened, and fourteen tribes are now named parties plaintiff. Organizations of commercial and sports fishermen intervened as party defendants or participated as amici curiae.

The district court found that Washington could not apply its existing fishing regulations to members of the treaty tribes without violating their federal treaty rights. The court held that the state could enforce only those regulations necessary for conservation, decreed an allocation of fishing opportunity between treaty Indians and other citizens,[1] and retained continuing jurisdiction to provide advance judicial scrutiny of all future state regulations affect-

*The Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

[1]"Other citizens" includes a substantial number of citizens of Indian ancestry who are no longer enrolled members of treaty tribes.

ing Indian treaty fishing rights. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). Both sides appealed.[2] We affirm and remand.

Historical Background

In the early 1850's, an increasing flow of American settlers poured into the lowlands of Puget Sound and the river valleys north of the Columbia. Washington Territory was organized in 1853. Isaac Stevens, its first governor, was commissioned to smooth the way for settlement by inducing the Indians of the area to move voluntarily onto reservations.

George Gibbs' official chronicle of the treaty proceedings reveals the governor as a tactful and effective negotiator. He united the scattered Indian communities into a number of tribes and selected "chiefs" from each tribe with whom to bargain. The Indians west of the Cascade Mountains were known as "fish-eaters"; their diets, social customs, and religious practices centered on the capture of fish. Their fish-oriented culture required them to be nomadic, moving from one fishing spot to another as the runs varied with the seasons. Stevens nevertheless persuaded them to settle down on designated reservations, thus freeing the great bulk of the land for American settlement without a bloody war of conquest. In exchange, he promised the tribes money and the benefits of the white man's civilization—material goods and education. Governor Stevens assured them, moreover, that they were restricted to the reservations only for the purpose of residence; he explained that they would remain free to fish off the reservations at their traditional fishing places in common with the white settlers.

In negotiating the treaties, Stevens read a predrafted document and asked for the Indians' comments and approval. Although the treaties read as typical legal documents, few if any of the Indian negotiators read or spoke English. The treaties and the Americans' explanation of their terms were translated into Chinook jargon, a trade medium of some 300 words common to most Northwest Indians. The district court found that the jargon was inadequate to express more than the general nature of the treaty provisions.

[2]The tribes have contended on appeal that the state may not regulate their fishing activities at treaty locations for any reason. Their assertion is foreclosed by the decision in *Puyallup Tribe of Indians v. Dept. of Game of Washington*, 391 U.S. 392 (1968).

During 1854 and 1855, Stevens executed treaties with all of the treaty tribes. Each treaty contained a provision guaranteeing off-reservation fishing rights similar to that found in the Treaty of Medicine Creek, 10 Stat. 1132:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .

To this day, fishing remains an important aspect of Indian tribal life, providing food, employment, and an ingredient of cultural identity. Indians have adopted modern techniques of sport and commercial fishing. They share the concern of other citizens with preservation of runs of anadromous fish. Some tribes regulate the times and manner of fishing by their members.

Decree of the District Court

The district court held that the state and its agencies can regulate off-reservation fishing by treaty Indians at their usual and accustomed grounds only if the state first satisfies the court that the regulation is reasonable and necessary for conservation. The court defined "conservation" as the perpetuation of a run or of a species of fish. The state must also show that the conservation objective cannot be attained by restricting only citizens other than treaty Indians. In addition, the regulation must not discriminate against treaty Indians and must meet appropriate due process standards.

Those treaty tribes meeting certain qualifying requirements (384 F. Supp. at 340-41) may regulate fishing by their own members free from any state regulation. Qualified tribes will be required, however, to fulfill certain conditions designed to keep the state informed concerning their regulations and fishing activities. The court found the Yakima Nation and the Quinault Tribe already qualified for self-regulation.

Each year, a certain escapement of fish is necessary to preserve the run. After this escapement has been allowed by either state or tribal regulation, the remainder of the run is available for harvest. The court decreed an allocation of this harvestable run between the treaty tribes and other citizens. The state may not regulate treaty Indians' taking of this harvestable run at their

"usual and accustomed grounds and stations" unless necessary to limit them to 50 percent of the harvest at those grounds. Treaty Indians thus are to have the opportunity to take up to 50 percent of the available harvest at their traditional grounds.

The harvest to be allocated comprises not merely those fish which actually pass the traditional fishing grounds, but also those captured en route and those bound for those grounds but caught in marine waters by non-treaty fishermen. The court decreed an "equitable adjustment" to the harvestable catch to compensate for attrition from these sources. On the other hand, those fish caught by treaty Indians on reservations or taken for traditional tribal ceremonies or personal consumption by tribal members and their immediate families are to be totally disregarded in calculating the harvestable catch.

The state and its agencies challenge virtually all of these features of the district court's decision.

Federal Preemption of State Regulation

By virtue of its police power, the state has initial authority to regulate the taking of fish and game. *Geer v. Connecticut,* 161 U.S. 519 (1896). The federal government, however, may totally displace state regulation in this area. For example, Congress has the power, under the commerce clause, to authorize construction of hydroelectric facilities, even though a dam totally destroys existing runs of fish in the river in violation of the public policy of the state and the desires expressed by a majority of its enfranchised citizens. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958); *Washington Department of Game v. FPC,* 207 F.2d 391 (9th Cir. 1953), *cert. denied,* 347 U.S. 936 (1954). The federal government may also preempt state control over fish and game by executing a valid treaty and legislating pursuant to it. *Missouri v. Holland,* 252 U.S. 416, 432 (1920). Furthermore, such a treaty may preempt state law even without implementing legislation; a treaty guaranteeing certain rights to the subjects of a signatory nation is self-executing and supersedes state law. *Asakura v. City of Seattle,* 265 U.S. 332, 341 (1924). Consequently, the state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and the Indian nations.

At issue, however, is not the federal government's power in executing treaties to preempt all state regulation of Indian fiishing, but whether it has in fact done so. "Absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49 (1973); *see Carey v. South Dakota,* 250 U.S. 118, 122 (1919). A treaty guaranteeing a right to fish distinct from that enjoyed by other citizens would be such an "express federal law." In deciding whether the Stevens' treaties created federal rights immune from abridgement by state law, we must read their terms against a "backdrop" of Indian sovereignty, recalling that when the treaties were signed, the United States regarded the tribes as nations, independent and sovereign. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973).

Although the United States dealt from a clearly superior position, the treaties were negotiated at arms' length. The treaties were not dictated to a defeated nation. The United States wished to free most of the land in the Puget Sound area for the impending white migration and settlement. Governor Stevens' task in executing the treaties was to induce the Indians to move onto reservations. The Indians expressed their concern that they would be unable to continue their traditional way of life, centered on the gathering of fish, because of limited fishing opportunities on the proposed reservations. The governor overcame their fears by promising them continued access to their traditional fishing areas off the reservations.

The treaties were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States v. Winans,* 198 U.S. 371, 381 (1905). The extent of that grant will be construed as understood by the Indians at that time, taking into consideration their lack of literacy and legal sophistication, and the limited nature of the jargon in which negotiations were conducted. *See id.* at 380. Although ceding their right to occupy the vast territories in which they had been accustomed to roam unimpeded, the Indians reserved their traditional right to fish at their accustomed places. They granted the white settlers the right to fish beside them. In a sense, the treaty cloaks the Indians with an extraterritoriality while fishing at these loca-

tions. Although present Indian status is not understood in terms of tribal sovereignty, recalling past acceptance of that concept aids in perceiving the Indians' understanding of the effect of the treaties which they signed. They retained the right to continue to fish as they were accustomed. Certainly, they did not understand that in permitting other citizens access to their traditional fishing areas they were submitting to future regulations calculated to benefit those other citizens.

Nevertheless, this is precisely how the state of Washington has regulated fishing for years. In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory. As the non-Indian population has expanded, treaty Indians have constituted a decreasingly significant proportion of the total population, catching a decreasing proportion of a fixed or decreasing number of fish. "This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans,* 198 U.S. at 380. *See Antoine v. Washington,* 94 S. Ct. 944, 951 (1975).

In summary, the Indians negotiated the treaties as at least quasi-sovereign nations. They relinquished millions of acres of their lands, retiring to reservations carved out of those lands. But they expressly reserved their indispensable rights to fish at their traditional places. The United States obtained for the settlers and for the subsequently-admitted state only the right of equal access to these fishing grounds. The treaty provision at issue grants the state's other citizens only a limited right to fish at treaty places; it thus is "express federal law" preempting all state regulation of Indian fishing at the treaty fishing grounds, except as hereafter stated. *Compare Mescalero,* 411 U.S. at 148-49.

State Regulation for Conservation

The relationship between treaty Indians and other fishermen which these treaties created is unique. The two groups of fishermen do not share a cotenancy in the fish or in the opportunity to fish. Nevertheless, their relationship is analogous to a cotenancy, and the experience of courts in adjusting competing claims between cotenants sheds light on the interpretation of the parties' treaty rights.

Cotenants stand in a fiduciary relationship one to the other. Each has the right to full enjoyment of the property, but must use it as a reasonable property owner. A cotenant is liable for waste if he destroys the property or abuses it so as to permanently impair its value. *See* Comment, *The Inter Vivos Rights of Cotenants Inter Se,* 37 Wash. L. Rev. 70, 76 (1962). A court will enjoin the commission of waste.

By analogy, neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed. The state may interfere with the Indians' right to fish when necessary to prevent the destruction of a run of a particular species in a particular stream. Thus, the Supreme Court has held that the state may regulate the time and manner in which the Indians take their catch when "necessary for the conservation of fish." *Puyallup Tribe v. Department of Game of Washington (Puyallup I),* 391 U.S. 392, 399, 402 n.14 (1968); *Tulee v. Washington,* 315 U.S. 681, 684 (1942).

The state defines "conservation" to embrace three objectives and urges that it should be allowed to curtail Indian fishing in pursuit of conservation so defined: 1) allowing sufficient escapement to perpetuate the fish run; 2) assuring the maximum sustained harvest; and 3) providing for an orderly fishery. But the only rationale for permitting state interference with Indian fishing precludes adoption of this definition and restricts the meaning of conservation to insuring optimum spawning escapement for perpetuation of the run. "Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival." *Department of Game of Washington v. Puyallup Tribe* (Puyallup II), 414 U.S. 44, 49 (1973).

The state's program for management of the state's fisheries may appear sound and commendable, but the state shares its rights in those fisheries with another party. It may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens. The state must pursue its goals as best it can by regulating its own non-treaty Indian citizens. The state may secure treaty Indians' compliance with these regulations only by gaining their acquiescence in its goals. Direct regula-

tion of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction. *Antoine v. Washington,* 94 S. Ct. 944, 952 (1975).[3]

Tribal Self-regulation

Preservation of fishery resources is of vital importance to Indians as well as to other citizens. At the same time, regulatory interference by the state with treaty fishing is obnoxious to the treaty tribes. These tribes have the power to regulate their own members and to arrest violators of their regulations apprehended on their reservations or at usual and accustomed fishing sites. *Settler v. Lameer,* (9th Cir., Nov. 26, 1974). The court, in its equitable discretion, decided that qualified tribes should have the power, subject to certain conditions, to regulate their own members in the interest of conservation free of state controls. So long as the tribes responsibly insure that the run of each species in each stream is preserved, the legitimate conservation interests of the state are not infringed. We hold that the court did not abuse its discretion.[4]

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[3]The Supreme Court observed that "the State must demonstrate that its regulation is a reasonable and necessary conservation measure . . . *and* that its application to the Indians is necessary in the interest of conservation." *Antoine,* 94 S.Ct. at 952 (emphasis by the Court). This limitation on the state's police power is nullified in practice when, as here, a court has ordered an apportionment of the opportunity to take the harvestable run. By apportioning between treaty Indians and other citizens the opportunity to take all fish not needed for escapement, the court in effect requires treaty Indians to contribute to preservation of the run. To do so deprives the Indians of no rights. Both treaty Indians and other citizens share responsibility, as quasi-cotenants, for the run's perpetuation. In *Antoine,* the Court denied the state's power to *compel* the treaty tribes to assist in assuring optimum escapement; it did not question the tribes' moral or equitable duty to do so. The tribes have come to court seeking equity in allocation of the harvestable catch; the court may first require them to fulfill their equitable responsibility to allow sufficient escapement.

[4]In *Kennedy v. Becker,* 241 U.S. 556 (1916), the Court rejected a concept of "dual sovereignty" by which the state would regulate non-Indians exclusiveiy, and the tribe, Indians. The Court held that such a duality would be unworkable; either entity would be able to destroy the resource, free of check by the other. *Id.* at 563. Neither the *Settler* panel nor we advocate such a duality. The tribe possesses a power of enforce-

Apportionment of the Right to Fish

The necessity to limit the catch to preserve a run defines the extent to which the state may exercise police power to regulate Indian fishing. By the treaty, the Indians granted citizens of the territory the right to fish in common with them, however, and the state may enforce regulations insuring that both groups of fishermen have fair access to the fish at the treaty areas. State officials are in close daily contact with fishing conditions in Washington; they should be permitted a certain amount of flexibility in devising rules to assure both groups opportunity to exercise their rights. In so regulating, however, they must be aware that they are not enforcing state policies but applying federal rights to concrete situations. Therefore, the district court wisely insisted that proposed state regulations be submitted to it for approval before being enforced as to treaty Indians.

The treaty provides only that those Indians may fish "in common with" other citizens at the traditional grounds. The legal effect of this clause has been much disputed. The district court interpreted it as justifying an equal apportionment of the opportunity to take fish:

> [N]on-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish . . . .

384 F. Supp. at 343.

The state argues that the term "in common with" was intended merely to insure that the treaty Indians would not be treated discriminatorily, that each Indian should have access to the traditional fishing grounds on the same footing as each white settler. The Supreme Court long ago considered this construction, how-

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ment inferable from its power to regulate. *Settler* (slip op. at 13). This power does not displace that of the state; ordinarily the state and the tribe possess concurrent power to regulate Indian fishing at usual and accustomed sites so far as necessary to preserve the run. However, the district court has enjoined the state's exercise of its power in order to advance the congressional policy of promoting tribal autonomy. If tribal self-regulation proves impracticable, we are certain that the court will revise this feature of its judgment.

ever, and rejected it. *United States v. Winans*, 198 U.S. 371, 379-82 (1905).

In the early years following the signing of the treaties, a policy of providing all individuals with equal access to fishing grounds sufficiently guaranteed all parties' rights under the treaties. White civilization has since engulfed that of the Indian, however. Demand for fish has outstripped supply. By continuing to treat the outnumbered treaty Indians no differently from other citizens, the state effectively allots them a decreasing share of the resource.

A cotenant dissatisfied with his partner's exploitation of their common property may seek a partition of the property in order to protect his interest in it. Comment, *supra*, 37 Wash. L. Rev. at 77. By analogy, the Indians are entitled to an equitable apportionment of the opportunity to fish in order to safeguard their federal treaty rights. *See* ***Puyallup II***, 414 U.S. at 48-49. The district court's apportionment does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession. *Geer*, 161 U.S. at 529. Rather, the court decreed an allocation of the *opportunity* to obtain possession of a portion of the run.

The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public. *See Lemon v. Kurtzman*, 411 U.S. 192, 200-01 (1973); *Swann v.* ***Charlotte-Mecklenburg Board of Education***, 402 U.S. 1, 15-16 (1971). In legislative reapportionment cases, for example, the Supreme Court has been content to review and decide the broad standards (one man, one vote) dictated by the fourteenth amendment, leaving the details of the implementation of those standards to the equitable discretion of the district courts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Similarly, we propose to state only those fundamental legal principles which define the parties' respective rights, reviewing the remainder of the district court's decree only for abuse of discretion.

We affirm the conclusion of the district court that the fundamental principle to be applied in a judicial apportionment is that treaty Indians are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds. This conclusion fol-

lows naturally from the circumstances in which the treaties were signed.

The treaties must be viewed as agreements between independent and sovereign nations. *McClanahan,* 411 U.S. at 172. The "tribes" in western Washington were constructed somewhat arbitrarily by Governor Stevens for his convenience in negotiating the treaties. Each tribe in many cases was an aggregate of smaller, more natural units—communities or villages. Nevertheless, each tribe was understood to be an entity for the purpose of each treaty.

Each tribe bargained as an entity for rights which were to be enjoyed communally. *See Sac and Fox Indians (Iowa) v. Sac and Fox Indians (Oklahoma),* 220 U.S. 481, 483-84 (1911). The reservations were reserved to each tribe *qua* tribe. Not until 1887 was the President authorized to allot reservation land to individual Indians. 24 Stat. 388. Individual Indians had no individual title to property, but participated in the communal rights of the tribe. "The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation." F. Cohen, Handbook of Federal Indian Law 183 (1942, reprinted 1971). The right to fish at usual and accustomed grounds was one such communal property right pertaining to the tribe. *Whitefoot v. United States,* 293 F.2d 658, 663 (Ct. Cl. 1961), *cert. denied,* 369 U.S. 818 (1962); Juergensmeyer & Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem,* 14 Natural Resources J. 361, 372 (1974). To hold that the Indian negotiators intended to secure for each member of the tribe the right to compete for fish on equal terms as an individual with each individual settler—the state's view of the "in common with" clause as a prototype of the fourteenth amendment's equal protection clause—thus would be to disregard the fabric of Indian society at the time the treaties were concluded, a society of communality whose nature was reflected in the subsequent legal character of property ownership which evolved in Federal Indian law. *See* F. Cohen, *supra.*

In each treaty, two parties—the United States and a tribe—bargained on the basis of formal equality. An attempt to partition equitably rights which these parties were to hold in common must reflect this initial equality. The district court was not required to

decree a perfect 50-50 division of fishing opportunity. *Cf. Mahan v. Howell*, 410 U.S. 315, 332-33 (1973); *Swann v. Adams*, 385 U.S. 440, 444 (1967); *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The court itself recognized the difficulty in practice of attaining that theoretical ideal. 384 F.Supp. at 343-44. Nevertheless, a 50-50 apportionment reflects the equality existing between the two bargaining parties and best effectuates what the Indian parties would have expected if a partition of fishing opportunities had been necessary at the time of the treaties. Thus the court's apportionment was well within its discretion.

"Equitable Adjustment"

Today, the treaty Indians' "usual and accustomed" fishing grounds in general are located upstream from sites of intensive non-treaty Indian fishing. Because the parties to the treaties did not anticipate shortages of harvestable fish, they did not foresee that downstream fishing by non-Indians would someday injure the Indians' right to fish at their usual places. Therefore, the Indians are entitled to catch 50 percent not simply of the fish passing the traditional grounds, but also of those destined for those grounds but captured dowstream or in marine waters.

The district court acknowledged the difficulty in determining with mathematical precision the number of fish bound for the tribes' fishing areas. The court recognized that a large portion of these fish are taken outside the jurisdiction of the state. Furthermore, many caught within Washington waters are taken under regulations issued by the International Pacific Salmon Fisheries Commission. On the other hand, it is reasonable to suppose that many fish appropriated beyond the state's regulatory jurisdiction are nonetheless taken by Washington citizens.

The court decreed:

> An additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside the jurisdiction of the State, although within Washington waters.

384 F.Supp. at 344. We agree with the state that the court's equitable discretion does not extend so far as to permit it to compensate the tribes for the unanticipated heavy fishing by foreign ships off the coast. The treaty granted equal rights at the traditional areas to Washington citizens, and their ability to fish is equally impaired by foreign fishing. On the other hand, Washington citizens who benefit from marine catches of fish bound for traditional areas, regardless of whether they are subject to state regulation while fishing, have received a portion of the non-treaty Indian entitlement under the treaty. The court therefore may act within its equitable discretion by adjusting the number of fish which the treaty Indians have an opportunity to catch in such a way as to reflect roughly the fact that non-treaty Indian citizens have already received a portion of their share of the run past the treaty sites even before the state obtained jurisdiction over their activities.

Insofar as the 1937 convention between the United States and Canada for the protection of the Fraser River fish runs, 50 Stat. 1355, the Sockeye Salmon or Pink Salmon Fishing Act of 1947, enacted pursuant to the convention, 16 U.S.C. §§ 776-776f, and regulations issued thereunder displace the regulatory powers of the state within the state's territorial waters, fishing within those waters should be treated no differently from fishing beyond the state's territorial jurisdiction. The court therefore may adjust equitably the treaty Indians' share to compensate them for fish taken by other Washington citizens under regulations issued by the International Pacific Salmon Fisheries Commission which otherwise would be available for harvest at their traditional treaty areas. The court may so adjust the tribes' allocation to compensate, of course, only those tribes which share in the harvest of Fraser River salmon—or other fish affected by the Commission's regulations—at their traditional areas. Losses in the catch of those fish not regulated by the Commission caused by Commission regulation of fishing gear may also be compensated.

We reject the state's contention that the Convention and Act have "pre-empted" Indian treaty rights to harvest Fraser River salmon. The Supreme Court has indicated its extreme reluctance to find congressional abrogation of Indian treaty rights in the absence of explicit statutory language so directing. *Menominee Tribe of*

Indians v. United States, 391 U.S. 404 (1968). Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulations, but, in the absence of an explicit expression of intent to terminate treaty rights, losses to other citizens sustained through compliance with those regulations should be redressed as above stated by adding to the treaty Indians' permitted catch in areas under state jurisdiction.

Fish Taken on Reservations

The state contends that fish caught by treaty Indians on their reservations should be included in their 50 percent allocation of the catch. Analysis of the structure of a typical treaty, the Treaty of Medicine Creek, 10 Stat. 1132, is instructive. In Article I, the Indians ceded their lands to the United States. In Article II, however, the treaty reserved "for the present use and occupation of the said tribes and bands, the following tracts of land. . . ." Finally, in Article III, "[t]he right of taking fish, at all usual and accustomed grounds and stations, is *further* secured to said Indians, in common with all citizens of the Territory. [Emphasis added]"

The right to take fish in common with the settlers off the reservations was a right reserved by the Indians in addition to their right to occupy and use reservation land. The settlers obtained no analogous rights on the reservations. Other citizens clearly have no more claim to a share of the fish caught on the reservations than they do to a right to reside on those reservations. The court thus did not abuse its discretion in excluding fish caught on the reservations from the apportionment.

We also affirm its decision, uncontested by the state, that fish taken off the reservation and actually used for traditional tribal ceremonies or for personal subsistence consumption by members of the tribe and their families shall not be counted in the apportionment.

Lummi Reef Net Fishing

The conflict between the Lummi Tribe and the non-treaty Indian reef net fishermen involves elements not found among the other tribes. Reef nets are installed at various locations in the

sound, parallel to the shoreline from about 125 to about 1,300 yards from shore.[5] Locations differ greatly in their productivity. The technique of reef net fishing was developed by the Indians, who used nets between reefs close to shore. Modern reef netting is far more sophisticated, making use of artificial "reefs" and heavy equipment, and is practical in deeper waters farther from shore. The court found that the fish had been driven from shallower waters by the whites' use of fish traps, now illegal, and by the widespread use of other fishing gear in the areas formerly devoted to Indian reef nets.

Reef net fishermen by gentlemen's agreement retain exclusive occupancy of a given location until they sell or otherwise dispose of their equipment. The court found that all Lummi reef net fishermen had been squeezed out of the fishery. At present, therefore, a member of the Lummi Tribe can reef net in a profitable location only by purchasing, at considerable expense, a non-treaty Indian's fishing gear.

The district court found that the present reef net areas are within the usual and accustomed grounds and stations of the Lummi Indians, and that the Lummis had a right to an opportunity to fish in those areas. The court, however, deferred for later consideration the specific relief to be afforded the Lummis at the expense of present occupants of reef net locations.

Reef net fishing is distinguishable from other forms of fishing in two important respects. First, only a finite number of profitable positions are available, each occupied at present by a white fisherman who is recognized by his fellow fishermen as owning a quasi-property interest in the site, an interest appurtenant to his ownership of his fishing gear. Any assignment of positions to treaty Indian fishermen must break down the present exclusive occupancy system. Second, and more important, the court found that:

> Reef net locations were owned [at the time of the treaty] by individuals who claimed proprietary rights by virtue of inheritance in the male line. These locations constituted very valuable properties to their native owners. . . . Some of the Lummi signers of the treaty were owners of reef net loca-

[5]This fact was determined from inspection of the aerial photos admitted by the District Court as exhibits RN 7 and RN 11.

> tions. Lummi Indians who were present at the Point Elliott Treaty Council later asserted that the Lummi signers had received assurances there that they would continue to hold the rights to their fishing grounds and stations, including their reef net locations.

384 F. Supp. at 361. The right to fish with reef nets was thus not a tribal right, as was other fishing, but one guaranteed to specific individuals.

The individual Indian's proprietary relationship with a specific reef net location presents an aberration from the general communal pattern of Indian property ownership. Nevertheless, the Treaty of Point Elliott must be interpreted with reference to the general pattern of ownership among the tribes subscribing to it, not to the aberrational.

The fact that, in general, Indians held property communally has led the courts to hold that property rights, vis-a-vis the United States, are vested in the tribe, not in the individual. Disputes among members of the tribe are left for the tribe to adjust internally. *See Whitefoot v. United States*, 293 F.2d 658, 661-63 & nn. 8 & 9 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).[6] In *Whitefoot*, for example, scarcity of good fishing locations at Celilo Falls on the Columbia river presented a similar situation. There, also, individual Indians had exercised an exclusive, hereditary right to fish certain choice locations. Nevertheless, the Court of Claims held that damages for inundation of the falls by federal construction of a dam were recoverable only by the tribe, not by individual tribal members. Similarly, no matter how Lummi fishermen held reef net locations according to tribal custom, so far as the United States is concerned, under the treaty the right to engage in reef net fishing belongs to the Lummi tribe. Therefore, fishing in the usual and accustomed reef net areas is subject to the same prin-

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[6]The concept of "property" can scarcely exist outside a legal framework. We are reluctant to force whatever notions of rights and duties regarding fishing locations were held by Indians in 1854 into an Anglo-American mold of "property rights." We are especially reluctant to do so when the tribe still exists with which we can deal as an intermediary, allowing it to arbitrate among the conflicting claims of its members according to the values and customs of their own culture.

ciple of equal division as is that in other usual and accustomed areas.

The non-Indian reef net fishermen maintain that today's fishing areas are not part of the Lummis' usual and accustomed areas. They assert that present reef netting is conducted in deeper water than that fished by the Lummis before the treaty was signed. The court, on the other hand, found that some present-day reef net gear is located directly upon traditional sites. It held that the "Lummi Tribe continues to hold treaty-secured rights to fish with reef net gear in its usual and accustomed places, including Legoe Bay off Lummi Island . . . ." 384 F. Supp. at 404. The court also found that:

> Since the turn of the century, the heavier volume of fish in the vicinity of Legoe Bay traveled close to shore. This has changed so that now fish must be taken in deeper water. This has been caused by the installation of traps [until they became illegal under state law] and the present abundance of other fishing gear in the reef net area. . . . In aboriginal times, Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including operation of the reef nets.

Id. at 361-62. Insofar as the district court thus concluded that usual and accustomed grounds and stations extended a sufficient distance from shore into Legoe Bay to enable the Indians to harvest most productively the available fish, that finding is not clearly erroneous. The term "grounds" as used in the treaties denotes a broader dimension than "stations" and can readily be understood to include the distances from shore at which present reef netting is done.

In fashioning equitable relief for the Lummis, the district court should give regard wherever practicable to minimizing the resulting hardship to present white reef net fishermen.

Muckleshoot Tribe

The Muckleshoot Indian Reservation, named after the prairie on which it is located, was established in 1857, two years after the treaties were signed. It was occupied by Indians who earlier

had been represented at Medicine Creek and at Point Elliott, as well as by some Indians who apparently were parties to neither of those treaties. The reservation was an arbitrary grouping; no Muckleshoot Tribe had previously existed. Nevertheless, the inhabitants of the reservation today are recognized as a tribe by the United States. The district court recognized the Muckleshoots as a treaty tribe. We agree.

The state refused to recognize membership in the tribe as conferring federal treaty rights. The Washington Supreme Court has held that a member of the Muckleshoot Tribe must establish that he is descended from a tribe or band which was represented at the signing of one of the treaties if he is to be accorded treaty rights. *State v. Moses*, 70 Wash.2d 282, 422 P.2d 775, *appeal dismissed*, 389 U.S. 428 (1967).

The Interior Department instructed Governor Stevens "to effect [if possible] the combination of all the Bands into six or eight Tribes, [and] to arrange half a dozen treaties or less, so that every one of the Tribes shall be a party to one of them." Exhibit USA 28. In the Treaty of Medicine Creek, 10 Stat. 1132, the tribes ceded all the land from the divide between the Puyallup and Duwamish rivers south to the Skookumchuck river, from the Sound to the crest of the Cascades. In the Treaty of Point Elliott, 12 Stat. 927, they ceded the land from the northern boundary of the territory ceded at Medicine Creek north to the Canadian border. Governor Stevens clearly believed that, except for those lands designated as reservations, he had successfully acquired the territorial rights of all the tribes in that vast area; and the district court found that the government has consistently treated the present-day Muckleshoot Tribe as the successor in interest of those of its constituent tribes which had been represented in the two treaties.

The state's principal fear seems to be that members of the Muckleshoot Tribe will be able to use the traditional areas of all the merged tribes, affording them special rights. The argument is specious. The member of every tribe composed of smaller bands possesses rights similarly more extensive than those of any one of his direct ancestors. The treaty Indians are restricted to the opportunity to take up to 50 percent of the harvestable catch at traditional areas. Each Indian can fish at but one location

at a time, so the state's concern that he is accorded double the treaty rights to which he is entitled is unfounded.

Stillaguamish and Upper Skagit Tribes

The Stillaguamish and Upper Skagit Tribes were parties to the Treaty of Point Elliott, but today are not recognized as organized tribes by the federal government. Rights under the treaties vested with the tribes at the time of the signing of the treaties. Non-recognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights. Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine. *Cf. Upper Chehalis Tribe v. United States*, 155 F. Supp. 226 (Ct.Cl. 1957). Once a tribe is determined to be a party to a treaty, its rights under that treaty may be lost only by unequivocal action of Congress. *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). Evidence supported the court's findings that the members of the two tribes are descendants of treaty signatories and have maintained tribal organizations. We therefore affirm the district court's conclusion that the Stillaguamish and Upper Skagit Tribes are entities possessing rights under the Treaty of Point Elliott.

Conclusion

The decision of the district court is affirmed in all respects, with the clarification that its "equitable adjustment" should not take account of fish caught by non-Washington citizens outside the state's jurisdiction. The case is remanded to the district court so that it may maintain continuing jurisdiction.

Affirmed and remanded.

BURNS, District Judge, concurring:

I concur, but I want to add a brief comment from the viewpoint of a district judge. As was suggested at oral argument, any decision by us to affirm also involves ratification of the role of the district judge as a "perpetual fishmaster." Although I recognize

that district judges cannot escape their constitutional responsibilities, however unusual and continuing duties imposed upon them, I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, police departments, and so on. The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-9-75—550

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

QUINAULT TRIBE OF INDIANS, et al.,

Intervenors-Plaintiffs,

vs.

STATE OF WASHINGTON,

Defendant-Appellee,

THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al.,

Defendants.

Order No.

74-2414, 2437, 2438, 2439, 2440, 2567, 2602, 2705

On Appeal from the United States District Court, for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges, and BURNS,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Choy and Goodwin voted to reject the suggestion for rehearing en banc, and Judge Burns recommended rejection.

*The Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has voted to grant rehearing en banc. F.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

However, the opinion heretofore filed is amended in the following particulars:

1) Amend the last sentence of the first paragraph on page 3 of the slip opinion to read:

> "Organizations of commercial and sports fishermen intervened as parties defendant or participated as amici curiae."

2) Amend the sentence running from page 16 to page 17 to read:

> "Reef nets are installed at various locations in the Sound parallel to the shoreline from about 125 to about 1300 yards from shore."

3) Amend footnote 5, page 17, to read:

> "This fact was determined from inspection of the aerial photographs admitted by the district court as exhibits RN 7 and RN 11."

Filed July 23, 1975.
Docketed Aug. 4, 1975.

UNITED STATES of America, Plaintiff,

Quinault Tribe of Indians on its own behalf and on behalf of the Queets Band of Indians, et al., Intervenor-Plaintiffs,

v.

STATE OF WASHINGTON, Defendant,

Thor C. Tollefson, Director, Washington State Department of Fisheries, et al., Intervenor-Defendants.

Civ. No. 9213.

United States District Court,
W. D. Washington at Tacoma.

Feb. 12, 1974.

STATEMENT OF THE CASE

BOLDT, Senior District Judge.

In September, 1970 the United States, on its own behalf and as trustee for several Western Washington Indian Tribes,[1] later joined as intervenor plaintiffs by additional tribes,[2] filed the complaint initiating this action against the State of Washington. Shortly later the State Department of Fisheries (Fisheries) and the State Game Commission (Game), their respective directors, and the Washington Reef Net Owners Association (Reef Net Owners) were included as defendants. By state statute Fisheries is charged with exercising regulatory authority over fishing for all anadromous food fish. Regulation of anadromous steelhead trout is vested in Game. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 concerning off reservation treaty right fishing within the case area by plaintiff tribes, which long has been and now is in controversy, and for injunctive relief to provide enforcement of those fishing rights as they previously have been or herein may be judicially determined. The case area is that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River

[1]Hoh Tribe; Makah Tribe, Muckleshoot Tribe; Nisqually Tribe; Puyallup Tribe; Quileute Tribe; Skokomish Tribe.

[2]Lummi Tribe; Quinault Tribe; Sauk-Suiattle Tribe; Squaxin Island Tribe; Stillaguamish Tribe; Upper Skagit River Tribe; Yakima Nation.

drainage area, and includes the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas.

Plaintiffs also assert claims for relief concerning alleged destruction or impairment of treaty right fishing due to state authorization of, or failure to prevent, logging and other industrial pollution and obstruction of treaty right fishing streams. Separation of those claims for pretrial and trial after trial of the issues determined in this decision was stipulated and approved by the court.

Venue is properly laid in this court under 28 U.S.C. § 1391(b). Jurisdiction is alleged as to all tribes under one or more of the following provisions: 28 U.S.C. §§ 1345, 1331, 1343,(3) and (4) and 1362.[3] All of these allegations were conceded by all defendants, subject to their contention that exclusive jurisdiction to hear and determine the issues in this case is in the Indian Claims Commission under 25 U.S.C. §§ 70-70v and Game's denial of jurisdiction as to the Puyallup Tribe. This court has previously held and hereby affirms that both of these contentions are without merit and denied. It is hereby found and held that jurisdiction and venue have been established in all particulars as detailed in Part One of the Final Pretrial Order.

Fisheries contends the Muckleshoot, Stillaguamish and Upper Skagit tribes do not hold a special treaty status to harvest anadromous fish. Game joins in this contention and makes the same contention regarding the Sauk-Suiattle Tribe. These contentions are considered and denied in the written Findings of Fact and Conclusions of Law.

Shortly after appearance in the action by all defendants the first of a considerable number of pretrial conferences was held. Among many preliminary matters considered at that time were the court's suggestions that so far as possible all tribes, agencies or organizations having or claiming direct or indirect justiciable interest in treaty fishing rights in this judicial district be brought into the case either as parties or as amicus curiae; and that every issue of substantial direct or indirect significance to the contentions of any party be raised and adjudicated in this case. Both suggestions were acceptable to all parties and to a great extent they have been put into

[3]See Final Pretrial Order paragraph 1.

effect. Thus every interested agency and organization not joined as a party has had an opportunity to present its views on any of the issues in the case.[4]

For more than three years, at the expenditure by many people of great time, effort and expense, plaintiffs and defendants have conducted exhaustive research in anthropology, biology, fishery management and other fields of expertise, and also have made extreme efforts to find and present by witnesses and exhibits as much information as possible that pertains directly or indirectly to each issue in the case. As a consequence of this extensive pretrial preparation, all parties joined in stipulating to a great many agreed facts which are stated in exhibits or included in the Final Pretrial Order. The Joint Biological Statement, Exhibit JX-2a, jointly proposed and admitted in evidence as agreed facts applicable as indicated therein, was prepared by and agreed to by highly qualified experts employed by and representing both plaintiffs and defendants and is of exceptional importance and practical value. It is believed considerable historic and scientific information never before presented in a case involving treaty rights is now recorded and may prove of value in later proceedings in this case and possibly in others.

To great advantage, all procedures recommended in the Manual for Complex Litigation have been followed by counsel in the particulars and to the extent found applicable and practicable by the court. With approval of court and counsel upon its entry the Final Pretrial Order became the final statement of all issues to be heard and determined in this decision, and pleadings pertaining to those issues passed out of the case, subject only to amendment by the court to prevent manifest injustice. Such amendments have been included in the text of the Final Pretrial Order.

Every attorney in the case has vigorously and effectively presented the particular interests and contentions of each client he represents to the maximum extent professional duty requires. On the other hand there has been a remarkable degree of highly respon-

[4]The following agencies or organizations have submitted, or concurred in written briefs: Idaho Fish & Game Department; Port of Seattle; Washington State Sportsmen's Council, Inc.; Northwest Steelheaders, Inc.; Committee to Save Our Fish; Tacoma Sportmen's Club, Inc.; Tacoma Poggie Club, Inc.; Purse Seine Vessel Owners Association.

sible and most commendable cooperation on the part of all counsel throughout trial preparation and trial which has greatly expedited discovery and full presentation of the issues and evidence in the case. All of the legal issues have been researched in depth and effectively presented and argued in the pretrial briefs, and in the final briefs submitted after the presentation of evidence was concluded and before final argument, which also was exceptional in professional quality. By direction of the court all parties either individually or jointly, as they chose, prepared and submitted proposed findings of fact and conclusions of law referenced to the record and also drafts of a proposed decree. Each proposed finding, conclusion and decree has been closely examined and considered by review of the evidence and the portions of the briefs pertaining to each item. All fact findings and legal rulings stated herein and the detailed Findings of Fact, Conclusions of Law and Decree signed and entered by the court are hereby made a part of this decision.

On January 11, 1974, when Game filed the final version of its proposed findings, conclusions and decree the issues tried were finally submitted for decision.

This court is confident the vast majority of the residents of this state, whether of Indian heritage or otherwise, and regardless of personal interest in fishing, are fair, reasonable and law abiding people. They expect that kind of solution to all adjudicated controveries, including those pertaining to treaty right fishing, and they will accept and abide by those decisions even if adverse to interests of their occupation or recreational activities.

More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. This has been inflamed by provocative, sometimes illegal, conduct of extremists on both sides and by irresponsible demonstrations instigated by non-resident opportunists.

To this court the evidence clearly shows that, in the past, root causes of treaty right dissension have been an almost total lack of meaningful communication on problems of treaty right fishing between state, commercial and sport fishing officials and non-Indian fishermen on one side and tribal representatives and members on the other side, and the failure of many of them to speak to each other

and act as fellow citizens of equal standing as far as treaty right fishing is concerned. Some commendable improvement in both respects has developed in recent years but this court believes high priorty should be given to further improvement in communication and in the attitude of every Indian and non-Indian who as a fisherman or in any capacity has responsibility for treaty right fishing practices or regulation. Hopefully that will be expedited by some of the measures required by this decision.

The ultimate objective of this decision is to determine every issue of fact and law presented and, at long last, thereby finally settle, either in this decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do.

I. ESTABLISHED BASIC FACTS AND LAW

(Hereinafter italicize emphasis added unless otherwise indicated)

The first decision of the United States Supreme Court on Indian treaty rights, Cherokee Nation v. Georgia, 5 Pet. 1, 30 U.S. 1, 8 L.Ed. 25, was written by Chief Justice Marshall in 1831. Since then decisions on the same subject matter have been rendered in that court, other federal courts and state courts in a considerable number to the present time.[5] All of the decisions that appear to have direct or indirect application to the present case have been closely reviewed and analyzed, individually and in relation to each other. Based thereon this court finds and holds that the following statements are now well established in fact and law.

1. Art. VI, cl. 2 of the United States Constitution provides:

> The "Constitution . . . of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. To the great advantage of the people of the United States, not only in property but also in saving lives of citizens, and to expedite providing for what at the time were immediate and imperative national needs, Congress chose treaties rather than conquest as the

[5]The Table of cases appended hereto includes only all cases which have been cited by any party as authority pertaining to any issue in this case and other cases considered by the court. In the table, the abbreviated title of each case referred to in the decision is italicized.

means to aquire vast Indian lands. It ordered that treaty negotiations with the plaintiff tribes and others in the Northwest be conducted as quickly as possible. Isaac I. Stevens, Governor of Washington Territory, proved to be ideally suited to that purpose for in less than one year during 1854-1855 he negotiated eleven different treaties, each with several different tribes, at various places distant from each other in this rugged and then primitive area. The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.[6]

In 1899 the United States Supreme Court in considering a similar situation said:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. Worcester v. Georgia, 6 Pet. 515 [8 L.Ed. 483]; The Kansas Indians, 5 Wall. 737, 760 [18 L.Ed. 667]; Choctaw Nation v. United States, 119 U.S. 1, 27, 28 [7 S.Ct. 75, 30 L.Ed. 306, 314, 315] . . . . 'The language used in treaties with the Indians should never be construed to their prejudice.' . . . 'How the words of the treaty were under-

[6]Exhibit (Ex) USA-20, pp 24-29; Finding of Fact (FF) #2.

stood by this unlettered people rather than their critical meaning, should form the rule of construction.' "[7]

In 1905 the above principles were reiterated in *Winans* (198 U.S. p. 380, 25 S.Ct. p. 664):

"And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.' [citing *Choctaw* and *Jones*]"

3. The United States Supreme Court in *Missouri* (252 U.S. p. 434, 40 S.Ct. p. 384) stated:

"Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.' Baldwin v. Franks, 120 U.S. 678, 683, 7 S.Ct. 656, 32 L.Ed. 766."

4. Each of the basic fact and law issues in this case must be considered and decided in accordance with the treaty language reserving fishing rights to the plaintiff tribes, interpreted in the spirit and manner directed in the above quoted language of the United States Supreme Court. Each treaty in this case contains a provision substantially identical to that in the Medicine Creek treaty: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, . . ."[8]

5. "The right to resort to the [usual and accustomed] fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . [T]he treaty was not a grant of rights to the Indians but a grant of right from them—a reservation of those not granted."[9]

"And surely it was within the competency of the Nation to

[7]*Jones*, 175 U.S. at 10, 11, 12, 20 S.Ct. at 5; other decisions by the same court containing the same or similar language: *Cherokee, Worcester, Kansas Indians, Winans, Kennedy, Seufert, Tulee*.

[8]Text of all treaties FF #1.

[9]U.S.Sup.Ct. in *Winans*, 198 U.S. at 381, 25 S.Ct. at 664.

secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' "[10]

6. ". . . [T]he [treaty] negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. . . . And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees."[11] That those rights are also reserved to the descendants of treaty Indians, without limitation in time, excepting as Congress may determine, has been recognized and applied by the United States Supreme Court from the first to the latest decision of that court involving Indian treaty fishing rights.

7. An *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations,[12] wherein tribal members might make their homes if they chose to do so. The tribes also reserved the *right* to off reservation fishing "at all usual and accustomed grounds and stations" and agreed that "all citizens of the territory" might fish at the same places "in common with" tribal members. The tribes and their members cannot rescind that agreement or limit non-Indian fishing pursuant to the agreement. However, off reservation fishing by other citizens and residents of the state is not a *right* but merely a *privilege* which may be granted, limited or withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require.

8. The tribes reserved the right to fish at *"all* usual and accustomed grounds and stations." The words "grounds" and "stations" have substantially different meanings by dictionary definition and as deliberately intended by the authors of the treaty. "Stations" indicates fixed locations such as the site of a fish wier or a fishing

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[10]Id. at 384, 25 S.Ct. at 665.

[11]Id. at 381-382, 25 S.Ct. at 664.

[12]This proposition is not denied or challenged by any party in this case. As previously stated in paragraph 4 of the text, the fishing clauses are substantially identical in the treaties of all plaintiff tribes. The fishing clause in the Yakima treaty applies the word "exclusive" to on reservation fishing. Although the word is used in the same context in several other treaties not involved in this case it does not appear in the treaty of any other plaintiff tribe. However, in every case involving a fishing clause substantially similar to that quoted in the text of this decision in which "exclusive" is not present, without exception the United States Supreme Court has assumed that on reservation fishing *is* exclusive and has interpreted and applied similar fishing clauses, as though the word "exclusive" was expressly stated therein as in the Yakima treaty. Research has not disclosed any reported decision to the contrary.

platform or some other narrowly limited area; "grounds" indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined. "Usual and accustomed," being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions. Therefore, the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.[13]

II. SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

This summary of the 253 separate detailed Findings of Fact and 48 Conclusions of Law filed herewith is intended as a recital of only the principal categories thereof, several of which are discussed elsewhere in this opinion.

The Findings of Fact set forth the treaties under which each tribe, or its predecessors, negotiated with the United States, and in which the Indians expressly reserved the right to fish at off reservation usual and accustomed fishing places. The pretreaty role of fishing among Northwest Indians is outlined, emphasizing the universal importance of the fishery resource, particularly salmon and steelhead, to Indians in the case area as an element of diet and in religious practices and trade. The Northwest Indians developed a wide variety of fishing methods which they utilized to catch many varieties of fish at innumerable locations throughout the areas where they lived and traveled.

In the mid-1850's the United States treated with the unlettered Northwest Tribes to acquire great expanses of land. Reluctant to be confined to small reservation bases, the Indian negotiators insisted that their people continue to fish as they had beyond the reservation boundaries. There is no indication that the Indians intended or

[13] *Seufert* and see F.F. 10 and 13.

understood the language "in common with all citizens of the Territory" to limit their right to fish in any way. For many years following the treaties the Indians continued to fish in their customary manner and places, and although non-Indians also fished, there was no need for any restrictions on fishing.

For each of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, and some, but by no means all, of their principal usual and accustomed fishing places. Anthropological data are also presented for several tribes, as well as information concerning present Indian culture and economy. Several tribes are currently involved in fish propagation programs which benefit the tribes and the state.

Fact findings are also presented regarding reef net fishing which show that current non-Indian reef net operations take place at or near the same locations occupied historically by Lummi Indian fishermen.

General fisheries conservation and management data are presented, incorporating the Joint Biological Statement which sets forth many significant facts concerning anadromous fish. Procedures and objectives are outlined for managing salmon and steelhead for commercial, sport and Indian user groups including regulatory schemes promulgated by state authorities and by Indian tribes. The means and locations used to harvest the resource and the quantity of the harvest are also presented.

The policies and practices of both Fisheries and Game are also presented. Due in part to the nature of the species of fish regulated, Fisheries evidences better success in managing the salmon than does Game with regard to steelhead. Fisheries has also evidenced an attitude of cooperation with the plaintiff tribes that has been lacking from Game, at least prior to *Puyallup-II*.

The Conclusions of Law, after stating the basis of jurisdiction and venue, establish the treaty status of each of the plaintiff tribes, and therefore, the right of their members to fish off reservation in common with the citizens of the state. The fishing right was reserved by the Indians and cannot be qualified by the state. The state has police power to regulate off reservation fishing only to the extent reasonable and necessary for conservation of the resource. For this purpose, conservation is defined to mean per-

petuation of the fisheries species. Additionally, state regulation must not discriminate against the Indians, and must meet appropriate due process standards.

The Yakima Nation and the Quinault Tribe are presently qualified to self-regulate the off reservation fishing of their tribal members. Other tribes may similarly self-regulate member fishing if and when they meet the qualifications and conditions set forth in the decision.

Several current state laws and regulations which restrict the time, place, manner and volume of off reservation fishing by treaty tribes, and reserve game fish for sport interests, have not been established as reasonable and necessary for conservation and the application thereof to plaintiff tribes is unlawful. The court will retain continuing jurisdiction of this case to grant such further relief as the court may find appropriate.

III. STATE REGULATION OF OFF RESERVATION TREATY RIGHT FISHING

There is neither mention nor slightest intimation in the treaties themselves, in any of the treaty negotiation records or in any other credible evidence, that the Indians who represented the tribes in the making of the treaties, at that time or any time afterward, understood or intended that the fishing rights reserved by the tribes as recorded in the above quoted language would, or ever could, authorize the "citizens of the territory" or their successors, either individually or through their territorial or state government, to qualify, restrict or in any way interfere with the full *exercise* of those rights. All of the evidence is overwhelmingly to the contrary, particularly in the vivid showing in the record that the treaty Indians pleaded for and insisted upon retaining the *exercise* of those rights as essential to their survival. They were given unqualified assurance of that by Governor Stevens himself without any suggestion that the Indians' *exercise* of those rights might some day, without authorization of Congress, be subjected to regulation by non-Indian citizens through their territorial or state government.[14]

For several decades following negotiation and ratification of the treaties all of the tribes extensively exercised their treaty rights by

[14]Ex. USA-20 pp 24-29, 42-43; FF #2.

fishing as freely in time, place and manner as they had at treaty time, totally without regulation or any restraint whatever, excepting only by the tribes themselves in strictly enforcing tribal customs and practices which, during that period and for innumerable prior generations, had so successfully assured perpetuation of all fish species in copious volume. The first other than naturally caused threat to volume or species came from non-Indian population growth and non-Indian industrial development in the rapid westward advance of civilization.[15]

In the final pretrial order in this case issues were raised therein by the contentions of several tribes later joined by the remaining plaintiff tribes that: (a) the state police power dicta followed by the United States Supreme Court are not sound in legal logic or principle, and (b) even if so, state regulation of the exercise of Indian off reservation treaty fishing rights must be denied in "justice and reason, looking to the substance of the rights reserved as understood by the Indians who negotiated the treaties, without regard to technical rules," as all American courts for a century or more have been repeatedly admonished by the United States Supreme Court in the same or similar language.[16]

In addition to raising the above stated issues in the final pretrial order, the tribes have submitted well researched briefs and vigorous oral argument in support thereof. That the contentions are not without at least color of merit in judicial and scholarly support is shown by a decision of the Supreme Court of Idaho,[17] the judicial views of at least one highly respected Washington State Supreme Court Judge[18] and a scholarly article in The University of Washington Law Review written by a Law Professor of that University and other similar articles.[19]

No federal decision or state decision cited to this court has directly and specifically interpreted the clause "in common with all citizens of the Territory" as, in itself, directly or impliedly justifying

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[15]Ex. USA-20, pp 39-42; FF #2.

[16]See footnote 7.

[17]*Author.*

[18]Donworth dissenting in *McCoy* (p. 439, 378 P.2d 942) and *Game-I* (70 Wash.2d p. 263, 422 P.2d 754); and in *Satiacum* (50 Wash.2d p. 529, 314 P.2 400) a 4-4 decision.

[19]R. Johnson, 47 U.Wash.L.Rev. 207 (1972); C. Hobbs, 37 Geo.Wash. L.Rev. 1251 (1969); Comment, 59 U.Calif.L.Rev. 485 (1971).

state police power regulation of off reservation treaty right fishing, or has specifically stated or even indicated any federal source of or basis for such state power.

Under these circumstances and the facts hereinabove recited, judicial integrity requires that this court must give the tribes' above stated contentions serious consideration and specific determination.

The first decision of the United States Supreme Court, later cited by the same court as authority for state regulation of treaty right fishing, is *Ward*. On that subject unquestionably the decision was obiter dictum because: (a) the Indian hunting rights reserved in the treaty in question were limited to specifically designated areas outside of which Race Horse hunted, for which he was imprisoned and from which he sought enlargement by habeas corpus; and (b) because later in the opinion it was held the treaty hunting rights in question had been finally terminated by Congress prior to the allegedly criminal hunting by Race Horse.

The only statement in *Ward* in either the majority or minority opinions that could possibly justify later citation of the decision as applicable to treaty right fishing was the single sentence 163 U.S. on page 507, 16 S.Ct. on page 1076:

> "The power of a state to control and regulate the taking of game cannot be questioned. Geer v. Connecticut, 161 U.S. 519, [16 S.Ct. 600, 40 L.Ed. 793]."

However, in the next preceding paragraph of the majority opinion in *Ward* two sentences before the sentence just quoted, the majority opinion stated:

> ". . . the sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege, therein (the treaty) referred to within the limits of the state of Wyoming in violation of its laws. If it [the treaty] gave such right, the mere fact that the state had created school districts or election districts, and had provided for pasturage on the lands, could no more efficaciously operate to destroy the right of the Indian to hunt on the lands *than could passage of the* [*state*] *game law*."

This statement, even if it too be a dictum, is far more sound in treaty law applicable to fish and game regulation than the first statement quoted above.

Thus the second statement in *Ward*, quoted in the paragraph

above to the effect that exercise of treaty right hunting cannot be controlled by state regulatory laws would appear to be compelling, or at least equal, authority for denying state regulation, not authorized by Congress, of Indian fishing off reservation as specified in existing treaties which expressly record and recognize reservation of that right by the Indian tribes.

In *Geer*, Mr. Justice White, speaking for a 5-2 majority traced in detail principles pertaining to the taking of *ferae naturae* down through the ages from Solon of ancient Athens to 1895, but treaty rights were not involved in that case or even mentioned in any way whatever in the exhaustive opinion. The only issue decided in *Geer* was the holding that it was not unconstitutional for Connecticut to allow, by regulation, killing of birds within the state during a designated open season, and to permit such birds, when so killed, to be used, sold and bought for use within the state, but forbid their transportation beyond the state. Hence the statement in *Geer* as well as that in *Ward*, on the subject of off reservation treaty right fishing, were both purest dicta.

Ward was not cited in *Winans*, wherein state power to regulate off reservation treaty fishing was assumed without any explanation or citation of authority. That subject was mentioned only in the concluding clause of a sentence (198 U.S. p. 384, 25 S.Ct. p. 665):

> ". . . nor does it [the right to take fish] restrain the state unreasonably, if at all, in the regulation of the right."

Geer, Ward, Patsone and *Lacoste* are cited in footnote #2 of *Tulee* (315 U.S. p. 683, 62 S.Ct. 864) as supporting the only statement in that opinion referring to the state power to regulate off reservation fishing:

> "Relying upon its broad powers to conserve game and fish within its borders, (2) however, the state asserts that its right to regulate fishing may be exercised at places like the scene of the alleged offense, which, although within the territory originally ceded by the Yakimas, is outside of their reservation."

In *Patsone* the United States Supreme Court reviewed the conviction of an alien for possession of a shotgun in violation of a state criminal statute. One of the two defenses presented and determined in the decision was based on provisions of a United States treaty with Italy. The treaty provisions and facts in *Patsone* are totally dissimilar to those in the present case and nothing in the

holdings or language in the opinion directly or by implication would legally authorize state regulation of a federally guaranteed civil right which is expressly stated in a treaty and the exercise of which right could not possibly endanger the personal safety of any resident of the State.

Treaty rights were in no way involved in *Lacoste*. The only statement in that decision (263 U.S. p. 549, 44 S.Ct. 186) concerning state police power to regulate the taking of wild animals is supported by citation of *Geer*, *Ward*, *Kennedy* and other decisions having only remote applicability in either fact or law to the present case.

The remaining treaty right fishing decisions of the United States Supreme Court are *Puyallup-I* and *Puyallup-II*. Thus until *Puyallup-I* was decided in 1968 there was neither judicial analysis nor citation of a non-dictum decision supporting police power state regulation of the exercise of Indian off reservation treaty right fishing in any Supreme Court decision because all previous Supreme Court references to that subject were either based solely on the reiterated dicta discussed above or assumed such authority without discussion of its basis or indication of its source.

In support of a statement in *Puyallup-I* (391 U.S. p. 399, 88 S.Ct. 1725) concerning state regulation of treaty fishing outside of reservations the United States Supreme Court cited *Winans* and *Kennedy* as forerunners of *Tulee* and quoted portions of all three. As indicated above herein, the *Tulee* and *Winans* quotations were dicta.

In *Kennedy*, a habeas corpus proceeding, Indian lands were transferred by the Seneca Tribe to private ownership in a 1797 treaty containing a provision which permitted the Seneca Indians to fish in waters on the lands conveyed "at will, and at all seasons of the year, regardless of the provisions of the game laws of the State of New York." Shortly after that conveyance the lands were resold and continued in private ownership to the time of *Kennedy*, decided in 1915. That decision cites *Geer* and *Ward* as the sole basis for its statement (241 U.S. p. 562, 36 S.Ct. p. 707) that "it is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the state . . . ." *Kennedy* paraphrases *Winans* for more than *Winans*

held and quotes the same passing reference to regulation in *Winans* previously quoted above.[20] Most significant of all, it is stated in the very *Kennedy* language quoted in *Puyallup-I* (391 U.S. pp. 399-400, 88 S.Ct. p. 1729) that the fishing clause in the treaty conveyance "is fully satisfied by considering it a reservation of a *privilege* of fishing . . ." subject to state regulation. If at this time anything concerning treaty fishing rights should be beyond doubt or question it is the basic principle that the treaty fishing of plaintiff tribes in this case is a reserved *right* and not a *mere privilege*. The treaty fishing in *Kennedy* was held to be only a *privilege* under the peculiar facts of that case. Nothing faintly comparable to those facts can be found in either *Puyallup-I* or the present case.

Another statement in *Puyallup-I* (391 U.S. p. 398, 88 S.Ct. p. 1728) concerning police power regulation, without analysis other than as stated therein, or citation of a non-dictum authority, is:

> "Moreover, the right to fish at those respective [usual and accustomed] places is not an exclusive one. Rather it is one 'in common with all citizens of the territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State."

This statement seems to say that because a state has police power to regulate fishing *privileges* which the state has granted and may limit or entirely withdraw, that is somehow a legal reason for state regulation of federal fishing *rights* which are expressly reserved in a treaty which only Congress has authority to limit or modify. If that seeming non sequitur be the law it certainly is deserving of more specific legal analysis and justification than it has ever had in any United States Supreme Court decision.

In *Puyallup-I* it is also stated (391 U.S. p. 398, 88 S.Ct. p. 1728):

> "The *right* to fish 'at all usual and accustomed' places *may, of course, not be qualified by the State,* even though all Indians born in the United States are now citizens of the United States. [citations] But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

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[20]". . . nor does it restrain the state unreasonably, if at all, in the regulation of the right." (198 U.S. p. 384, 25 S.Ct. p. 665)

That a treaty *right*, guaranteed as the supreme law of the land by the Federal Constitution, can not be "qualified" (i.e. "in some way limited or modified")[21] by a state but the *exercise* of the right may be limited or modified by state regulation, especially when these seemingly conflicting propositions are stated in consecutive sentences, is very difficult to comprehend. The practical effect of a difference between *having* a constitutional right but only a limited right to *exercise* it certainly could not have been understood and accepted by the "unlettered" Indians who negotiated the treaties and it must be little less impossible for their somewhat more sophisticated present-day descendants to comprehend and accept.

Mindful that treaty fishing is a right, not a mere privilege, the following sentence from *Murdock*, quoted in a footnote (p. 402, 88 S.Ct. p. 1730) of Puyallup-I, seems pertinent:

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

As stated by the United States Supreme Court in *Winans* (198 U.S. pp. 381-382, 25 S.Ct. 662), treaty fishing rights are personal rights held and exercised by individual tribe members. Although the exercise of that particular civil treaty right may be limited or modified in any particular or to any extent by or with authority of Congress,[22] that the exercise of such a right may be limited in any way by the police power of a state, without having previously received authority to do so from Congress, seems to be diametrically opposed to relevant treaty law and personal civil rights decisions, particularly those of recent years.

In the *Puyallup-II* decision, decided less than three months ago, it was stated (414 U.S. p. 2, 94 S.Ct. p. 332):

> "The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steel head trout."

Other than by recital or quotations from *Puyallup-I* and State Supreme Court decisions, in *Puyallup-II* there was no discussion of or ruling upon the basis of state police power to regulate off reservation treaty right fishing unless it be derived from the next to the

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[21]Webster's Third New International Dictionary of the English Language, 1961 Ed. (p 1858)

[22]*Lone Wolf* citing other Supreme Court decisions to the same effect.

last paragraph in the opinion of Justice Douglas (pp. 5-6, 94 S.Ct. p. 333):

> "We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets."

Whatever the above quoted statement may have added to or taken from the right to exercise the off reservation treaty fishing rights of the plaintiff tribes, to the present time there never has been either legal analysis or citation of a non-dictum authority in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties which the federal Constitution mandates must be considered and applied as "the supreme Law of the Land."

From the above summary of the United States Supreme Court decisions it is clear the following 1971 comment by the Washington State Supreme Court[23] is not overstated:

> "Surprisingly little judicial attention, we note, has been given to this rather standard treaty language [in the fishing rights clause of Indian treaties]."

It also appears that the United States Supreme Court has exercised a prerogative specifically reserved by and to Congress in the treaties. Congress has never exercised its prerogative to either limit or abolish Indian treaty right fishing. In recent years it declined to do the latter by three times failing to enact proposed legislation for the termination of Indian treaty fishing rights.[24] It may be that the refusal or failure of Congress to exercise a specific prerogative, by enactment of legislation, would legally justify judicial exercise of that particular prerogative. If so, it has never been stated or indicated in any United States Supreme Court decision as the basis

[23] *Moses-II*, 79 Wash.2d at p. 108, 483 P.2d p. 834.

[24] H.R.J. Res. 698, 87th Cong., 2d Sess. (1962); H.R.J.Res. 48, 88th Cong., 1st Sess. (1963); S.J.Res. 170 & 171, 88th Cong., 2d Sess. (1964) All have died in committee.

or source of authority for the federal judicial decisions authorizing state regulation of off reservation treaty fishing rights.

Since Congress has the power to qualify or revoke any treaty or any provision thereof,[25] unquestionable federal authority is available to provide federal regulation, or to authorize state regulation, for the protection of fishery resources against any threatened or actual harm that might arise from off reservation treaty right fishing by tribal members limited *only* by tribal regulation.[26] In these circumstances it is unfortunate, to say the least, that state police power regulation of off reservation fishing should be authorized or invoked on a legal basis never specifically stated or explained. This is particularly true because state regulation of off reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future.

Having the judicial duty to independently research, consider and fairly appraise the tribes' contention concerning state regulation of off reservation treaty right fishing, this court has intended and attempted to do that as conscientiously and thoroughly as possible within the personal capabilities of the author of this decision. The results of that effort are above stated as directly and briefly as the subject matter appeared to permit.

In the opinion of this court, judicial integrity also requires this court to hold that the tribes' contention that the state does not have legal authority to regulate the exercise of their off reservation treaty right fishing must be and hereby is denied by this court. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge, despite academic or personal misgivings, to enforce and apply every principle of law as it

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[25]See footnote 22.

[26]With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

Unfortunately, insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court.

is directly stated in a decision of the United States Supreme Court. Recently the United States Supreme Court in *Puyallup-I* and *Puyallup-II* directly and specifically held that Washington has the power to regulate off reservation treaty right fishing in the particulars and to the extent indicated in those decisions, which holding continues in effect unless and until overruled or modified by that court or by Congress. Accordingly, each of the rulings on specific issues in this case stated in Section IV of this decision has been considered and determined on that basis.

IV. RULINGS ON MAJOR ISSUES IN THIS CASE

1. In the detailed Findings of Fact and Conclusions of Law on file herein this court has found and held and hereby reaffirms that each of plaintiff tribes in this case, including each of the tribes whose status as such was challenged by some or all defendants, has established its status as an Indian tribe recognized as such by the federal government and therefore is entitled to maintain this action for relief based on a treaty of the United States negotiated by and for the tribe, its members at that time and their descendants.

An appeal from a district court decision holding that the Puyallup reservation no longer exists has not yet been determined. However, in *Menominee* (1968) the United States Supreme Court held that termination of a tribal reservation established pursuant to a treaty did not extinguish hunting and fishing rights, reserved in the treaty by implication, or impair the exercise of such rights within the area of the terminated reservation. In the opinion of this court, treaty right fishing within the area of a former Indian reservation cannot be *exclusive* when that reservation no longer exists, but such fishing must be "in common with" non-treaty right fishermen. It is so found and held and hereby shall be applicable to any plaintiff tribe, the reservation of which has been or hereafter may be terminated.

2. Ever since the first Indian treaties were confirmed by the Senate, Congress has recognized that those treaties established self-government by treaty tribes, excepting only as limited in the treaties, judicial interpretation thereof or by Congress. This basic principle was confirmed in the first United States Supreme Court decision dealing with such a treaty[27] and has always been expressly or

[27] *Cherokee*, 30 U.S. p. 15 et seq. (1831)

impliedly reaffirmed when applicable in every succeeding decision of that court. There was a period during which Congress enacted legislation limiting the exercise of tribal autonomy in various particulars. However, in the last decade Congressional legislation has definitely been in the contrary direction, notably in the socalled "Indian Civil Rights Act."[28] Among other measures in that Act encouraging the exercise of tribal autonomy are those providing for enlarged jurisdiction of tribal courts, pursuant to which special training of tribal judges and other court personnel has been in progress for some time and still continues.

These measures and others make plain the intent and philosophy of Congress to increase rather than diminish or limit the exercise of tribal self-government.

The right to fish for all species available in the waters from which, for so many ages, their ancestors derived most of their subsistence is the single most highly cherished interest and concern of the present members of plaintiff tribes, with rare exceptions even among tribal members who personally do not fish or derive therefrom any substantial amount of their subsistence. The right to fish, as reserved in the treaties of plaintiff tribes, certainly is the treaty provision most frequently in controversy and litigation involving all of the tribes and numerous of their individual members for many years past.

The philosophy of Congress referred to above and the evidence in this case as a whole clearly indicate to this court that the time has now arrived, and this case presents an appropriate opportunity, to take a step toward applying congressional philosophy to Indian treaty right fishing in a way that will not be inconsistent with *Puyallup-I* and *Puyallup-II* and also will provide ample security for the interest and purposes of conservation.

In all the circumstances shown by the evidence, including those briefly sketched above, this court hereby finds and holds that any one of plaintiff tribes is entitled to exercise its governmental powers by regulating the treaty right fishing of its members without any state regulation thereof; PROVIDED, however, the tribe has and maintains the qualifications and accepts and abides by the conditions stated below. If, as to any plaintiff tribe, any one

[28]Pub.L. #90-284 Title II-VII; 82 Stat. pp. 77-81 (1968)

of such qualifications and conditions is not determined by the court in this decision on the evidence in this case, establishment of the qualifications and conditions of each other plaintiff tribe shall be determined either to the satisfaction of both Fisheries and Game, or upon hearing by or under direction of the court. When the qualifications and conditions of a tribe have been fully established in the manner indicated, that tribe shall be relieved of state regulation except to the extent specified in the below stated conditions. Failure of a tribe either to maintain its required qualifications or to abide by and adhere to prescribed conditions, when established and not promptly corrected, shall suspend self-regulation by such tribe until such time as all required qualifications and conditions are fully established.

To qualify for self-regulation of off reservation treaty right fishing as above provided, a tribe must establish to the satisfaction of either Fisheries and Game or the court, that the tribe has each of the following qualifications and that the tribe will accept and abide by each of the following conditions.

QUALIFICATIONS

The tribe shall have:

(a) Competent and responsible leadership.

(b) Well organized tribal government reasonably competent to promulgate and apply tribal off reservation fishing regulations that, if strictly enforced, will not adversely affect conservation.

(c) Indian personnel trained for and competent to provide effective enforcement of all tribal fishing regulations.

(d) Well qualified experts in fishery science and management who are either on the tribal staff or whose services are arranged for and readily available to the tribe.

(e) An officially approved tribal membership roll.

(f) Provision for tribal membership certification, with individual identification by photograph, in a suitable form that shall be carried on the person of each tribal member when approaching, fishing in or leaving either on or off reservation waters.

CONDITIONS

The tribe shall:

(a) Provide for full and complete tribal fishing regulations which, before adoption, have been discussed in their proposed final form with Fisheries and Game, and include therein any state regulation which has been established to the satisfaction of the tribe, or upon hearing by or under direction of this court, to be reasonable and necessary for conservation.

(b) Permit monitoring of off reservation Indian fishing by Fisheries and Game to the extent reasonable and necessary for conservation.

(c) Provide fish catch reports, as to both on and off reservation treaty right fishing, when requested by Fisheries or Game for the purpose of establishing escapement goals and other reasonable and necessary conservation purposes.

All parties in this case agree that on reservation fishing is not subject to state regulation and no issue to the contrary is presented in this case. Indeed, any contention to the contrary would be diametrically opposed to the Indian self-government intent and philosophy of Congress. However, state regulation of off reservation fishing to the extent reasonable and necessary for conservation requires that Fisheries and Game must have all information essential to such limited regulation. From the evidence in this case, the court hereby finds and holds that recording the number of fish taken in treaty right fishing, both on and off reservation, is essential to reliable estimates of future run sizes which are necessary for reasonably accurate calculation of spawning escapement requirements and for the allocation of harvestable fish as provided in this decision.

The lack of adequate, or any, approved identification of treaty right fishermen long has and now does seriously interfere with their fishing and hampers enforcement of both tribal and state regulations reasonable and necessary for conservation. Therefore, each of plaintiff tribes, self-regulated or not, is hereby directed to provide as promptly as practicable both (a) certification and identification of its tribal fishermen as specified in ¶ (f) of the above stated Qualifications; and also (b) fish catch returns as specified in ¶ (c) of the above stated conditions.

The uncontradicted evidence shows that for a considerable time

the Quinault and Yakima tribes have adopted and effectively enforced tribal fishing regulations which in some material respects are more restrictive than the regulations of Fisheries and Game. To a considerable extent those tribes have consulted and cooperated with Fisheries and Game in matters pertaining to responsible regulation of Indian fishing. In the Findings of Fact and Conclusions of Law on file herein the court has found, held and hereby confirms that the evidence in this case clearly establishes that both the Quinault and Yakima Tribes for a considerable time have had, and now have, each of the above stated Qualifications, other than (f), and have provided or permitted each of the above stated Conditions, other than (c). The items excepted can and the court believes will be promptly supplied by both tribes; and when accomplished, the Quinault and Yakima Tribes shall be entitled to exercise their treaty fishing rights without any state regulation thereof, except as hereinabove provided.

The evidence indicates several other plaintiff tribes have capacity for, and are not far from, achievement of the same status, which potentially is within the capability of every plaintiff tribe.

3. Although state police power permits state regulation of the exercise of off reservation treaty fishing rights, under all of the United States Supreme Court decisions cited or quoted hereinabove there can be no doubt that it is *not* within the province of state police power, however liberally defined, to deny or "qualify" rights which are made the supreme law of the land by the federal constitution. Therefore, in each specific particular in which the state undertakes to regulate the exercise of treaty right fishing, all state officers responsible therefor must understand that the power to do so must be interpreted narrowly and sparingly applied, with constant recognition that *any* regulation will restrict the exercise of a right guaranteed by the United States Constitution. Every regulation of treaty right fishing must be strictly limited to specific measures which before becoming effective have been established by the state, either to the satisfaction of all affected tribes or upon hearing by or under direction of this court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish.

To clearly identify state treaty right fishing regulations and to make them more readily understood and usable by plaintiff

tribes and others interested therein such regulations shall be published either separate and apart from other state fishing regulations or as a separate and plainly labeled part thereof readily distinguishable from other fishing regulations.

4. However broadly the word may be used and applied in the theory and practice of fisheries science and management, "conservation" as used in Supreme Court decisions and herein is limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish. In this context, as well as by dictionary definition, "reasonable" means that a specifically identified conservation measure is appropriate to its purpose; and "necessary" means that such purpose in addition to being reasonable must be essential to conservation.

5. The state having the burden of proof as above indicated, no regulation applied to off reservation treaty fishing can be valid or enforceable unless and until it has been shown reasonable and necessary to conservation as above defined. The arrest of, or seizure of property owned or in permitted custody of, a treaty right fisherman under a regulation not previously established to be reasonable and necessary for conservation, is unlawful and may be actionable as to any official or private person authorizing or committing such unlawful arrest or seizure.

6. If alternative means and methods of reasonable and necessary conservation regulation are available the state cannot lawfully restrict the exercise of off reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish.

7. In *Arizona* the United States Supreme Court held that irrigation water rights reserved by implication in an Indian treaty could only be limited in amount to the total reasonably required by the needs of the treaty tribe as determined from time to time indefinitely in the future. That holding cannot be distinguished in principle or application from the fishing rights specifically reserved by the plaintiff tribes and recognized by the United States in the treaties. Since tribal on reservation treaty right fishing is exclusive, fish taken on reservation shall not be included in any allocation of fish between treaty and non-treaty fishermen. Therefore,

the *amount* or *quantity* of any species of fish that may be taken off reservation by treaty right fishing during a particular fishing period can only be limited by either:

(a) The number of fish required for spawning escapement and any other requirements established to be reasonable and necessary for conservation, and

(b) The number of harvestable fish non-treaty fishermen may take at the tribes' "usual and accustomed grounds and stations" while fishing "in common with" treaty right fishermen.

As used above, "harvestable" means the number of fish remaining to be taken by any and all fishermen, at usual and accustomed grounds and stations, after deducting the number of fish required for spawning escapement and tribal needs.

Arizona was concerned with the amount of water impliedly reserved for the use of the treaty tribe and it was held they were entitled to the full amount required to serve their needs. In the present case a basic question is the amount of fish the plaintiff tribes may take in off reservation fishing under the express reservation of fishing rights recorded in their treaties. The evidence shows beyond doubt that at treaty time the opportunity to take fish for personal subsistence and religious ceremonies (FF ## 3, 6) was the single matter of utmost concern to all treaty tribes and their members. The extent of taking fish by tribal members for these purposes is now less than in former times but for a substantial number of tribal members at or near poverty level their need in these particulars is little, if any, less than it was for their ancestors. For these reasons the court finds that the taking of fish for ceremonial and subsistence purposes has a special treaty significance distinct from and superior to the taking of fish for commercial purposes and therefore fish taken to serve ceremonial and subsistence needs shall not be counted in the share of fish that treaty right fishermen have the opportunity to take. Such needs shall be limited to the number of fish actually used for: (a) Traditional tribal ceremonies; and (b) Personal subsistence consumption by tribal members and their immediate families.

By dictionary definition and as intended and used in the Indian treaties and in this decision "in common with" means *sharing*

equally the opportunity to take fish[29] at "usual and accustomed grounds and stations"; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish, as stated above.

While emphasizing the basic principle of sharing equally in the opportunity to take fish at usual and accustomed grounds and stations, the court recognizes that innumerable difficulties will arise in the application of this principle to the fisheries resource. For the present time, at least, precise mathematical equality must give way to more practical means of determining and allocating the harvestable resource, with the methodology of allocation to be developed and modified in light of current data and future experience. However, it is necessary at the outset to establish the scope of the anadromous fish resource which is subject to being "shared equally." The amount of fish of a particular species, from which the harvestable portions allocable to treaty right fishermen and non-treaty right fishermen are to be determined, is not merely the number of harvestable fish of that species which pass through the usual and accustomed fishing places of the various treaty tribes.

It is uncontroverted in the evidence that substantial numbers of fish, many of which might otherwise reach the usual and accustomed fishing places of the treaty tribes, are caught in marine areas closely adjacent to and within the state of Washington, primarily by non-treaty right fishermen. [Ex. F-6, 7; PL-67(b)-(c); JX-2(a), pp. 125-135; Figs. 49-54, Tables 34-60]. These catches reduce to a significant but not specifically determinable extent the number of fish available for harvest by treaty right fishermen. A considerable amount of this harvest is beyond any jurisdiction or control of the State. Some of this harvest is subject to limited state control because the landings are made in areas of state jurisdiction. A considerable number of fish taken within the territorial waters of Washington are under the regulatory authority of the International Pacific Salmon Fisheries Commission, an international body estab-

[29]The court has found and hereby affirms that Indians fished for commercial purposes at and prior to treaty times and have the right to do so now and in the future. If and when any question is raised by any party pertaining to commercial fishing by Indians, it will be heard and determined by the court. (FF #7).

lished by treaty between the United States and Canada. While the defendants cannot determine or control the activities of that Commission, the Washington Department of Fisheries does have some input into development of the harvest program which is prescribed or permitted by that Commission, particularly as it pertains to harvest within Washington waters. The Commission is essentially concerned with assuring adequate spawning escapement from runs subject to its jurisdiction and equal division of the harvestable portion between the two countries. Its control over times, places and manner of harvest is designed to accomplish those results. [Ex. JX-2a, § 2.14, pp. 013-104; and the Commission's annual report for 1971.] Consequently, while it must be recognized that these large harvests by non-treaty fishermen cannot be regulated with any certainty or precision by the state defendants, it is incumbent upon such defendants to take all appropriate steps within their actual abilities to assure as nearly as possible an equal sharing of the opportunity for treaty and non-treaty fishermen to harvest every species of fish to which the treaty tribes had access at their usual and accustomed fishing places at treaty times. Some additional adjustments in the harvesting scheme under state jurisdiction may be necessary to approach more nearly an equal allocation of the opportunity to harvest fish at usual and accustomed grounds and stations.

Therefore, this court finds and holds that the amount of fish of each species from which the harvestable portions shall be determined for the purposes of allocation consistent with this opinion shall be:

1. The total number of fish within the regulatory jurisdiction of the State of Washington which, absent harvest en route, would be available for harvest at the treaty tribes' usual and accustomed fishing places; plus

2. An additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside the jurisdiction of the State, although within Washington waters.

It is suggested in *Puyallup-II* that a distinction between native and propagated steelhead should be made in computing

the allocation of fish to off reservation treaty right and to non-treaty right fishing. This appears to present many difficulties and problems which must be considered and determined with all deliberate speed, by agreement or by judicial decision. Discharge of that responsibility appears to be within the jurisdiction of this court by issues all parties have submitted to this court in the Final Pretrial Order in this case. However, under the *Puyallup-II* mandate to the State Supreme Court it appears appropriate to this court that the state courts hear and determine the matter referred to, at least in the first instance.

8. Certain issues in this case are specified in the Final Pretrial Order which involve reef net fisheries. The only parties in this case directly concerned with these issues are the defendant Reef Net Owners and the plaintiff Lummi Tribe, although it may be other parties and non-parties have the same or similar interests. In the Findings of Fact and Conclusions of Law filed herein, the court has found and held: (a) that there is evidence which the court finds reasonable, credible and sufficient to establish that plaintiff Lummi Tribe has treaty fishing rights in the reef net fishing areas involved; (b) that members of the Lummi Tribe are entitled to and shall have, as a matter of *right*, the opportunity to fish with reef nets in such areas; (c) that while non-treaty fishermen when licensed by the State to fish in reef net areas have the *privilege* of fishing in those areas "in common with" Lummi Tribal members, they do not have the *right* to do so.

The specific number and location of stations in the reef net areas at which Lummi Tribal members shall have the right and opportunity to fish and what, if any, conditions shall be applicable thereto, will be determined by or under direction of this court upon hearing of those matters at the earliest date reasonably convenient to counsel and the court.

9. *Sohappy* is a 1969 decision by Judge Robert Belloni of the Oregon United States District Court on Indian treaty fishing rights involving a number of law and fact issues identical or closely similar to those presented in this case. Much of what was found and held in that thoroughly researched, well reasoned and highly practicable decision is directly applicable to issues to be determined in the present case. The *Sohappy* decision was not appealed and therefore it is controlling as to all parties to that case which include the United States and the Yakima Tribe. The following quotations from

that decision, changed by this court only as bracketed, are hereby adopted and held by this court to be applicable to the issues in the present case.

302 F.Supp. at page 907:

". . . [B]efore [Washington] may regulate the taking and disposition of fish by treaty Indians at their usual and accustomed fishing places:

'(a) It must establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes; the burden of establishing such facts is on the state.

'(b) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. As one method of accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

'(c) It must so regulate the taking of fish that the treaty tribes and their members will be accorded an opportunity to take, at their usual and accustomed fishing places, by reasonable means feasible to them, . . . fish [to the extent hereinabove specified.]

* * * * * *

At pages 908-909:

". . . state restriction on treaty referenced fishing must be 'necessary for the conservation of the fish.' . . . It [the Supreme Court] was not endorsing any particular state management program which is based not only upon that factor but also upon allocation of fish among particular user groups or harvest areas, or classification of fish to particular uses or modes of taking.

The state may regulate fishing by non-Indians to achieve a wide variety of management or 'conservation' objectives. Its selection of regulations to achieve these objectives is limited only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment. But when it is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use

its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource. The measure of the legal propriety of a regulation concerning the time and manner of exercising this 'federal right' is, therefore, 'distinct from the federal constitutional standard concerning the scope of the police power of the State.' [citations] To prove necessity, the state must show there is a need to limit the taking of fish and that the particular regulation sought to be imposed upon the exercise of the treaty right is necessary to the accomplishment of the needed limitation. This applies to regulations restricting the type of gear which Indians may use as much as it does to restrictions on the time at which Indians may fish."

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At page 911:

"The Supreme Court has said that the right to fish at all usual and accustomed places may not be qualified by the state. Puyallup Tribe et al. v. Department of Game, et al., supra. [citations] I interpret this to mean that the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located."

At page 911:

"There is no reason to believe that a ruling which grants the Indians their full treaty rights will affect the necessary escapement of fish in the least. The only effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago."

* * * * * *

At pages 911-912:

"In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy [at least] co-equal with the conservation of fish runs for other users. The restrictions on the exercise of the treaty right must be expressed with such particularity that the Indian can know in advance of his actions precisely the extent of the restriction which the state has [shown] to be necessary for conservation. [citations]

This court cannot prescribe in advance all of the details of appropriate and permissible regulation of the Indian fishery, nor do the plaintiffs ask it to. As the Government itself acknowledges, 'proper anadromous fishery management in a changing environment is not susceptible of rigid predetermina-

tion. * * * the variables that must be weighed in each given instance make judicial review of state action, through retention of continuing jurisdiction, more appropriate than overly-detailed judicial predetermination.' The requirements of fishery regulation are such that many of the specific restrictions, particularly as to timing and length of seasons, cannot be made until the fish are actually passing through the fishing areas or shortly before such time. Continuing the jurisdiction of this court in the present cases may, as a practical matter, be the only way of assuring the parties an opportunity for timely and effective judicial review of such restrictions should such review become necessary.

I also do not believe that this court should at this time and on this record attempt to prescribe the specific procedures which the state must follow in adopting regulations applicable to the Indian fishery. The state must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the tribal entities are interested parties to any regulation affecting the treaty fishing right. They, as well as their members to whom the regulations will be directly applicable, are entitled to be heard on the subject and, consistent with the need for dealing with emergency or changing situations on short notice, to be given appropriate notice and opportunity to participate meaningfully in the rule-making process. [and to seek prompt judicial review of regulations assertedly invalid.]

This does not mean that tribal consent is required for restrictions on the exercise of the treaty rights."

* * * * * *

At page 912:

". . . the state's authority to prescribe restrictions within the limitations imposed by the treaties and directly binding upon the Indians is not dependent upon assent of the tribes or of the Secretary of the Interior. But certainly agreements with the tribes or deference to tribal preference or regulation on specific aspects pertaining to the exercise of treaty fishing rights are means which the state [should] adopt in the exercise of its jurisdiction over such fishing rights. Both the state and the tribes should be encouraged [and directed] to pursue such a cooperative approach . . ."

Thus far, this decision has been confined to discussion and ruling upon major issues, mostly because of the great number of secondary, or comparatively less important, issues of fact and law presented in this case. However, fact findings and legal conclusions, with comment thereon in most instances, on all of the secondary findings are

included in the Findings of Fact and Conclusions of Law filed herein. For the most part the secondary findings and conclusions provide amplifying and implementing details for both major and secondary rulings of the court. Every issue, proposed finding of fact and conclusion of law, of whatever importance, has been individually considered and determined in the Findings of Fact and Conclusions of Law on file in this case, excepting only with a few reservations that are stated and explained in each instance.

Subject to suggested limitations by some of the parties, all parties have urged that the court reserve continuing jurisdiction of this case and have suggested various ways in which such jurisdiction might be exercised. Quotations from *Sohappy,* above quoted and adopted by this court, indicate some of the purposes for, and practical importance of, continuing jurisdiction in this type of case. From the beginining most, if not all, counsel in this case and the court have anticipated that continuing jurisdiction would be of great value to all parties in promptly putting the court's rulings into effect and in providing readily available early hearing and determination of factual and legal questions that may arise in interpreting and applying such rulings. Accordingly, the court does hereby reserve continuing jurisdiction of this case without limitation at this time.

Most if not all parties have also suggested that the court should appoint a master with technical fisheries expertise to assist the court in helping the parties to reach agreed solutions of problems and questions when agreement thereon cannot be reached. Questions regarding whether or not a master should be appointed, the suggested and perhaps other purposes for appointment of a master, with or without technical fisheries expertise; and, if appointed what the master's duties should be and the manner of his selection, will be considered and determined at a hearing on the earliest date after the entry of the judgment and decree reasonably convenient to all counsel. At that hearing counsel are requested to present their views as to whether or not the court should appoint an Advisory Committee on Treaty Right Fishing. The members of such a committee should be knowledgeable and responsible citizens inclined to and capable of objectively considering, determining and reporting to the court the viewpoint of the interested public concerning Indian fishing as to: satisfactory solution of problems; means of expediting better communication between Indian and non-Indian officials and fishermen

and keeping interested citizens in this area more accurately informed on matters pertaining to Indian fishing. Other topics to be considered at the conference may be suggested by counsel.

The remaining issues in this case reserved for separate pretrial and trial in the future, however such issues may be determined, do not have direct or indirect bearing upon any issue submitted and heretofore tried by this court. Accordingly, this decision and the Declaratory Judgment and Decree based thereon, upon entry in this case, shall become unreservedly final and reviewable as provided by 28 U.S.C.A. 2201; subject only to determination of any motions that may be appropriately and timely served and filed following entry of the Final Judgment and Decree. Each such motion, if any, that may be filed shall be supported[30] by a memorandum of authorities to which

[30]Local Rules WD Wash. Civil Rule 7.

counsel for adverse parties shall timely serve and file a responsive memorandum of authorities, following which such motions, if any, shall be promptly heard and determined by the court on the earliest date reasonably convenient to counsel and the court.

The findings of fact, conclusions of law, decrees and rulings by the District Court are very long and therefore in accordance with a conversation with the Clerk's office are not set forth in this Appendix. That material is reported in 384 F. Supp. 312, commencing at 348.

TREATY OF MEDICINE CREEK

December 26, 1854
10 Stat. 1132

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

TREATY OF POINT ELLIOTT

January 22, 1855
12 Stat. 927

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* that they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE MAKAH (TREATY OF NEAH BAY)

January 31, 1855
12 Stat. 939

ARTICLE IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and

unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE QUINAIELTS

July 1, 1855
12 Stat. 971

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

TREATY WITH THE YAKIMAS

June 9, 1855
12 Stat. 951

ARTICLE III. *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

1937 CONVENTION BETWEEN UNITED STATES AND CANADA—ratified by Congress and Proclaimed August 4, 1937 (50 Stat. 1355 as supplemented by 8 T.I.A.S. 3867, 8 U.S.T. 1057)

* * *

The President of the United States of America and His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada, recognizing that the protection, preservation and extension of the sockeye salmon fisheries in the Fraser River system are of common concern to the United States of America and the Dominion of Canada; that the supply of this fish in recent years has been greatly depleted and that it is of importance in the mutual interest of both countries that this source of wealth should be restored and maintained, have resolved to conclude a Convention and to that end have named as their respective plenipotentiaries:

* * *

Who, after having communicated to each other their full powers, found in good and due form, have agreed upon the following Articles:

* * *

ARTICLE II

The High Contracting Parties agree to establish and maintain a Commission to be known as the International Pacific Salmon Fisheries Commission, hereinafter called the Commission, consisting of six members, three on the part of the United States of America and three on the part of the Dominion of Canada.

The Commissioners on the part of the United States of America shall be appointed by the President of the United States of America. The Commissioners on the part of the Dominion of Canada shall be appointed by His Majesty on the recommendation of the Governor General in Council.

* * *

ARTICLE III

The Commission shall make a thorough investigation into the natural history of the Fraser River sockeye salmon, into hatchery methods, spawning ground conditions and other related matters. It shall conduct the sockeye salmon fish cultural operations in the waters described in paragraphs numbered 2 and 3 and Article I of

this Convention, and to that end it shall have power to improve spawning grounds, construct, and maintain hatcheries, rearing ponds and other such facilities as it may determine to be necessary for the propagation of sockeye salmon in any of the waters covered by this Convention, and to stock any such waters with sockeye salmon by such methods as it may determine to be most advisable. * * *

ARTICLE IV

The Commission is hereby empowered to limit or prohibit taking sockeye salmon in respect of all or any of the waters described in Article I of this Convention, provided * * *[1] that no order limiting or prohibiting taking sockeye salmon adopted by the Commission shall be construed to suspend or otherwise affect the requirements of the laws of the State of Washington or of the Dominion of Canada as to the procuring of a license to fish in the waters on their respective sides of the boundary, or in their respective territorial waters embraced in paragraph numbered 1 of Article I of this Convention, and provided further that any order adopted by the Commission limiting or prohibiting taking sockeye salmon on the High Seas embraced in paragraph numbered 1 of Article I of this Convention shall apply only to nationals and inhabitants and vessels and boats of the United States of America and the Dominion of Canada.

ARTICLE V

In order to secure a proper escapement of sockeye salmon during the spring or chinook salmon fishing season, the Commission may prescribe the size of the meshes in all fishing gear and appliances that may be operated during said season in the waters of the United States of America and/or the Canadian waters described in Article I of this Convention. At all seasons of the year the Commission may prescribe the size of the meshes in all salmon fishing gear and appliances that may be operated on the High Seas embraced in paragraph numbered 1 of Article I of this Convention, provided, however, that in so far as concerns the High Seas, requirements prescribed by the Commission under the authority of this paragraph shall apply only to nationals and inhabitants and vessels and boats of the United States of America and the Dominion of Canada.

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[1]The material we have shown as deleted was removed by Article II, 8 U.S.T. 1057.

Whenever, at any other time than the spring or chinook salmon fishing season, the taking of sockeye salmon in waters of the United States of America or in Canadian waters is not prohibited under an order adopted by the Commission, any fishing gear or appliance authorized by the State of Washington may be used in waters of the United States of America by any person thereunto authorized by the State of Washington, and any fishing gear or appliance authorized by the laws of the Dominion of Canada may be used in Canadian waters by any person thereunto duly authorized. Whenever the taking of sockeye salmon on the High Seas embraced in paragraph numbered 1 of Article I of this Convention is not prohibited, under an order adopted by the Commission, to the nationals or inhabitants or vessels or boats of the United States of America or the Dominion of Canada, only such salmon fishing gear and appliances as may have been approved by the Commission may be used on such High Seas by said nationals, inhabitants, vessels or boats.

ARTICLE VI

No action taken by the Commission under the authority of this Convention shall be effective unless it is affirmatively voted for by at least two of the Commissioners of each High Contracting Party.

All regulations made by the Commission shall be subject to approval of the two Governments with the exception of orders for the adjustment of closing or opening of fishing periods and areas in any fishing season and of emergency orders required to carry out the provisions of the Convention.[2]

ARTICLE VII

The Commission shall regulate the fisheries for sockeye and for pink salmon with a view to allowing, as nearly as practicable, an equal portion of such sockeye salmon as may be caught each year and an equal portion of such pink salmon as may be caught each year to be taken by the fishermen of each Party.[3]

ARTICLE VIII

Each High Contracting Party shall be responsible for the enforcement of the orders and regulations adopted by the Commission under

[2]The second paragraph of Article VI, was added by Article III, 8 U.S.T. 1057.

[3]The original Article VII was replaced with this language by Article IV, 8 U.S.T. 1057.

the authority of this Convention, in the portion of its waters covered by the Convention.

Except as hereinafter provided in Article IX of this Convention, each High Contracting Party shall be responsible, in respect of its own nationals and inhabitants and vessels and boats, for the enforcement of the orders and regulations adopted by the Commission, under the authority of this Convention, on the High Seas embraced in paragraph numbered 1 of Article I of the Convention.

* * *

ARTICLE IX

Every national or inhabitant, vessel or boat of the United States of America or of the Dominion of Canada, that engages in sockeye salmon fishing on the High Seas embraced in paragraph numbered 1 of Article I of this Convention, in violation of an order or regulation adopted by the Commission, under the authority of this Convention, may be seized and detained by the duly authorized officers of either High Contracting Party, and when so seized and detained shall be delivered by the said officers, as soon as practicable, to an authorized official of the country to which such person, vessel or boat belongs, at the nearest point to the place of seizure, or elsewhere, as may be agreed upon with the competent authorities. * * *

ARTICLE X

The High Contracting Parties agree to enact and enforce such legislation as may be necessary to make effective the provisions of this Convention and the orders and regulations adopted by the Commission under the authority thereof, with appropriate penalties for violations.

* * *

16 USC

§ 776a. Unlawful acts

(a) It shall be unlawful for any person to engage in fishing for sockeye salmon or pink salmon in convention waters in violation of the convention or of this chapter or of any regulation of the Commission.

* * *

(g) It shall be unlawful for any person or vessel to do any act prohibited or to fail to do any act required by the convention or by this chapter or by any regulation of the Commission.

July 29, 1947, c. 345, § 3, 61 Stat. 511; July 11, 1957, Pub.L. 85-102, § 3, 71 Stat. 294.

16 USC

§ 776d. Enforcement—Designation of Federal agency; cooperation with State and Dominion officers

(a) The President of the United States shall designate a Federal agency which shall be responsible for the enforcement of the provisions of the convention and this chapter and the regulations of the Commission, except to the extent otherwise provided for in the convention and this chapter. It shall be the duty of the Federal agency so designated to take appropriate measures for enforcement at such times and to such extent as it may deem necessary to insure effective enforcement and for this purpose to cooperate with other Federal agencies, State officers, the Commission, and with the authorized officers of the Dominion of Canada.

Authorization to State officers

(b) The Federal agency designated by the President for enforcement purposes may authorize officers and employees of the State of Washington to enforce the provisions of the convention and of this chapter and the regulations of the Commission. When so authorized such officers may function as Federal law-enforcement officers for the purposes of this chapter.

Conformity to convention article

(c) Enforcement of the convention and this chapter and the regulations of the Commission shall be subject to and in accordance with the provisions of article IX of the convention.

Arrests, searches, and seizures

(d) * * * any officer or employee of the State of Washington who is authorized by the Federal agency so designated by the President; * * * shall have power, without warrant or other process, but subject to the provisions of the convention, to arrest any person committing in his presence or view a violation of the convention or of this chapter or of the regulations of the Commission and to take such person immediately for examination before an officer or trial before a court of competent jurisdiction; and shall have power, without warrant or other process, to search any vessel within convention waters when he has reasonable cause to believe that such vessel is subject to seizure under the provisions of the convention or this chapter, or the regulations of the Commission, and to search any place of business or any commercial vehicle when he has reasonable cause to believe that such place or vehicle contains fish taken, possessed, transported, purchased, or sold in violation of any of the provisions of the convention, this chapter, or the regulations of the Commission. Any person authorized to enforce the provisions of the convention and of this chapter and the regulations of the Commission shall have power to execute any warrant or process issued by an officer or court of competent jurisdiction for the enforcement of this chapter, and shall have power with a search warrant to search any person, vessel, or place, at any time. * * * Subject to the provisions of the convention, any person authorized to enforce the convention and this chapter and the regulations of the Commission may seize, whenever and wherever lawfully found, all fish caught, shipped, transported, purchased, sold, offered for sale, imported, exported, or possessed contrary to the provisions of the convention or this chapter or the regulations of the Commission and may seize any vessel, together with its tackle, apparel, furniture, appurtenances and cargo, and all fishing gear, used or employed contrary to the provisions of the convention or this chapter or the regulations of the Commission, or which it reasonably appears has been used or employed contrary to the provisions of the convention or this chapter or the regulations of the Commission.

* * *

RCW 75.40.060 The director and his duly authorized agents are hereby authorized to adopt and to enforce the provisions of the convention between the United States and the Dominion of Canada for the protection, preservation and extension of the sockeye salmon fishery of the Fraser River system, signed at Washington, District of Columbia, on the twenty-sixth day of May, 1930, and the regulations of the commission promulgated under authority of said convention.

The District Court held that the following state statutes cannot lawfully be applied to restrict members of tribes having treaty fishing rights from exercising those rights. (Title 75 RCW relates to salmon and Title 77 RCW relates to game and steelhead.) (Conclusion of Law 41, 384 F. Supp. 312, ...) p.

RCW 75.08.260 Unless otherwise provided for in the fisheries code any person who violates any of the provisions of the fisheries code, or any of the rules or regulations of the director made pursuant thereto, or who aids or abets or assists in the violation thereof, shall be guilty of a gross misdemeanor, and upon a conviction thereof shall be punished by imprisonment in the county jail of the county in which the offense is committed for not less than thirty days or more than one year, or by a fine of not less than twenty-five dollars or more than one thousand dollars, or by both such fine and imprisonment.

RCW 75.12.060 It shall be unlawful to construct, install, use, operate, or maintain within any waters of the state any pound net, round haul net, lampara net, fish trap, fish wheel, scow fish wheel, set net, weir, or any fixed appliance for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means.

RCW 75.12.070 Unless otherwise provided for in the regulations of the director, it shall be unlawful to shoot, gaff, snag, snare, spear, stone, or otherwise molest any food fish or shellfish in any of the waters of the state.

RCW 75.12.160 It shall be unlawful to fish for salmon for commercial purpose with reef net fishing gear in any waters of the state of Washington except in those waters within the reef net areas described in this chapter.

RCW 77.08.020 [This statute defines game fish and includes within the definition steelhead.]

RCW 77.12.100 Any member of the commission, the director, and all game protectors, deputy game protectors, and ex officio game protectors, may seize without warrant all wild birds, wild animals, game fish, or parts thereof, taken, killed, transported, or possessed contrary to law, or rule or regulation of the commission, and any dog, gun, trap, net, seine, decoy, bait, boat, light, fishing tackle, or other device unlawfully used in hunting, fishing, or trapping, or held with intent to use unlawfully in hunting, fishing, or trapping. The justice of the peace in either of the two nearest incorporated cities or towns nearest the place the seizure is made shall have power and jurisdiction in any prosecution for unlawfully hunting, fishing, or trapping, in addition to any other penalty provided by law, to forfeit for the use of the commission, any wild animal, wild bird, or game fish, and any article or dog so seized and proved to have been unlawfully used or held with intent unlawfully to use. In case it appears upon the sworn complaint of the officer making the seizure that any articles seized were not in the possession of any person, and that the owner thereof is unknown, the court shall have power and jurisdiction to forfeit such articles so seized upon a hearing duly had after service of summons, describing the articles seized, upon the unknown owner by publication in the manner provided by law for the service of summons by publication in civil actions. All dogs, guns, traps, nets, seines, decoys, baits, boats, lights, fishing tackle, or other devices seized under the provisions of this title unless forfeited by order of the court, shall be returned, after the completion of the case, and the fines, if any, have been paid.

RCW 77.12.130 All nets, seines, lanterns, snares, devices, contrivances, and materials while in use, or had and maintained, for the purpose of catching, taking, or killing, or attracting, or decoying any wild bird, wild animal, or game fish, contrary to law or rule or regulation of the commission, are public nuisances. The director and all game protectors, deputy game protectors, ex officio game protectors, and all police officers, shall without warrant or process, take, seize, abate, or destroy them while being used, had, or maintained for such purpose.

RCW 77.16.020 It shall be unlawful for any person to hunt, trap, or fish for any game birds, game animals, fur-bearing animals

or game fish during the respective closed seasons therefor. It shall also be unlawful for any person to kill, take, or catch any species of game birds, game animals, fur-bearing animals, or game fish in excess of the number fixed as the bag limit. It shall also be unlawful for any person to hunt or trap for any game birds, game animals, or fur-bearing animals within the boundaries of any game reserve or closed area, and it shall likewise be unlawful for any person to fish for any game fish within any closed waters or within the boundaries of any game fish reserve.

Any person who hunts or traps any elk, moose, antelope, mountain goat, mountain sheep, caribou or deer in violation this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who hunts or traps any game bird in violation of this section is guilty of a misdemeaner and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

RCW 77.16.030 It shall be unlawful for any person to have in his possession or under his control any game bird, nongame bird, game animal, fur-bearing animal, or game fish, or part thereof, during the closed season or in excess of the bag limit.

Any person who has in his possession or under his control any elk, moose, antelope, mountain goat, mountain sheep, caribou, deer, or part thereof in violation of the foregoing portion of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who has in his possession or under his control any game bird or part thereof in violation of the foregoing portion of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten

days and not more than thirty days or by both such fine and imprisonment.

Provided, That any person who has lawfully acquired possession of any game bird, game animal, or game fish, or part thereof, and who desires to retain it for human consumption or ornamental purposes, or desires to sell the skin, hide, horns, head, or plumage thereof, after the close of the season may do so in accordance with the rules and regulations of the commission.

Provided, further, That the owner of any game bird, nongame bird, game animal, fur-bearing animal, or game fish who, has lawfully propagated it or purchased from one who has so propagated it, may possess, ship, sell or otherwise dispose of such bird, animal, or fish, when properly tagged or sealed.

RCW 77.16.040 Except as authorized by permit or license lawfully issued by the director, or by rule or regulation of the commission, it shall be unlawful for any person to have in his possession for sale or with intent to sell, or to expose or offer for sale or to sell or to barter for, or to exchange, or to buy, or to have in his possession with intent to ship, or to ship, any game animal, game bird, game fish, or endangered species of fish or wildlife or any part thereof or any article made in whole or part from the skin, hide, or other parts of any endangered species of fish or wildlife. It shall further be unlawful for any common or contract carrier knowingly to transport or receive for shipment any such game animal, game bird, or fish, or endangered species of fish or wildlife or any part thereof or any article made in whole or part from the skin, hide, or other parts of any endangered species of fish or wildlife: *Provided,* That nothing contained in this section shall prohibit any person from buying, selling, or shipping any lawfully tagged or sealed game animal, game bird, or game fish purchased from a licensed game farmer.

Any person violating this section shall be guilty of a gross misdemeanor and upon conviction thereof shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

RCW 77.16.060 It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tip-up,

snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any of the waters of this state with intent thereby to catch, take or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: *Provided*, That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of nongame fish.

Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

I hereby certify that on this 17th day of October, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage paid, to Robert H. Bork, Solicitor General, Justice Building, Constitution Avenue between 9th & 10th St., NW, Washington, D.C. 20530, counsel for respondents. I further certify that all parties required to be served have been served.

EDWARD B. MACKIE,
Deputy Attorney General
Temple of Justice
Olympia, Washington 98504